



Nova Scotia

Reports of the Nova Scotia Advisory Committees on Constitutional Issues



REPORTS OF THE
Nova Scotia Advisory Committees
on Constitutional Issues
PROVINCE OF
NOVA SCOTIA

1991

PREFACE

This volume brings together the reports of the six Advisory Committees established by the Government of Nova Scotia to serve as a resource of expert Constitutional knowledge for the Nova Scotia Working Committee on the Constitution. All members of the Advisory Committees served on a voluntary basis throughout the summer and fall of 1991. The Province is fortunate indeed to number so many dedicated, thoughtful and knowledgeable people among its citizens.

On 7 June 1991, Hon. Don Cameron, the Premier of Nova Scotia, Mr Vince MacLean, the Leader of the Official Opposition, and Ms Alexa McDonough, the Leader of the New Democratic Party, agreed to establish the Working Committee on the Constitution. The Committee's mandate was to hold public hearings in September and, in November, to submit a public report identifying the Constitutional options most acceptable to Nova Scotians.

At the same time as he announced the appointment of the Working Committee, Premier Cameron also noted that, to help the Working Committee fulfil its mandate, Advisory Committees would be appointed to advise on specific Constitutional matters. These were: Aboriginal Issues; Charter of Rights, Women's, Bilingual and Multicultural Issues; Government Structure and the Division of Powers; Economic and Fiscal Issues; Constitutional Process; and Comparative Federalism.

By September, the Advisory Committees were to make their reports available to, and brief, the Working Committee before it proceeded to hold public hearings. (See the Terms of Reference in Appendix I to this volume). Subsequently, the Working Committee could draw upon the counsel of the Advisory Committees for clarification of Constitutional issues.

The Advisory Committees fully and ably discharged these responsibilities. Since it was understood that the Advisory Committees' reports would be published only after the Working Committee had reported, the Advisory Committees had the opportunity between September and November to reconsider some of their views and conclusions in light of the Federal Constitutional proposals of 24 September. The reports are therefore the result of much meditation and discussion by each committee and are a substantial contribution to the Canadian Constitutional debate.

The Advisory Committees were generally drawn from members of the Nova Scotian university community or from private citizens with considerable experience in, and knowledge of, Constitutional matters. One committee, the Advisory Committee on Aboriginal Issues, was formed somewhat differently: the Mi'kmaq political organizations were each asked to nominate a member, so that the aboriginal people of this Province could participate directly in the advisory process. The names of Committee members are found in Appendix II to this volume.



INTRODUCTION

The Constitution of Canada is not a simple document. Since it governs the many and various relations between governments and between governments and people, its provisions are likewise many and various. Nor, in the strict sense, is it only the Constitution Act, 1867 (formerly the British North America Act, 1867) and the Constitution Act, 1982 (which contains, among other things, the Canadian Charter of Rights and Freedoms). About thirty other acts have Constitutional status and many government practices and even institutions, such as the Cabinet, are governed by unwritten convention.

Amending the Constitution to reflect the realities of Canada and the aspirations of Canadians must accordingly take into account a complex body of law and custom. There is frequently the need of expert help and informed opinion. Consequently, as part of the public process of consultations on the Constitution, the three political leaders decided to establish Advisory Committees to assist the Working Committee on the Constitution and, more generally, to explore some of the key issues in depth.

The Advisory Committees' conclusions are stated in the reports in this volume. These reports consider the principal issues in the current Constitutional debate and examine some of the options available to the political leaders of Nova Scotia as they guide the Province through the coming months of negotiation.

The complexities of the Constitutional debate are recognized in the report of the Advisory Committee on Aboriginal Issues, which is concerned not only with issues of a Constitutional nature, such as the aboriginal and treaty right of self-government, but also with issues of process. The Committee considers three issues of central importance to the Mi'kmaq people and their political organizations: the struggle for the recognition of Mi'kmaq rights, the importance of direct Mi'kmaq representation in the Constitutional debate, and the right to self-government.

The report of the Advisory Committee on Charter of Rights, Women's, Bilingual and Multicultural Issues recognizes that the Canadian Charter of Rights and Freedoms focuses primarily on individual rights and recommends that collective rights within it be affirmed and strengthened. The report considers property rights, the distinct society, language rights, multiculturalism, equality rights and the notwithstanding clause. It also surveys and endorses the concepts of socioeconomic and environmental Charters.

The report of the Advisory Committee on the Division of Powers and Government Institutions tackles both subjects from the standpoint of Nova Scotia's interests. On the division of powers, the Committee argues that Nova Scotia can tolerate marginal decentralization only, and that an asymmetric arrangement is the better option for the Province, and for an accommodation with Quebec. Two important sub-arguments concern the economic union, and the use of the Federal spending power.

On the question of national institutions, the report reviews the House of Commons, the issue of Senate reform and the concept of a Council of the Federation, the emphasis falling upon the Senate. The Committee elaborates on the best type of upper chamber, in

theory, for a small Province both in theory and in light of the reality of economic and political forces in Canada.

The report of the Advisory Committee on Economic Issues is divided into two parts. The first considers the fundamental economic issues in the Constitutional debate that are most important to Nova Scotia, namely, equalization payments, social programs and the economic union. For Nova Scotia, a crucial aspect of any Constitutional change will be the accompanying set of Federal-Provincial fiscal arrangements. The second part deals with a number of other economic issues that are expected to arise in the Constitutional discussions, including the division of powers, transportation, the spending power, resource sectors, financial regulation and the environment. A minority report presents some dissenting views.

The report of the Advisory Committee on the Constitutional Amending Process considers the nature of the Constitutional amending process, Canada's current amending processes and various recent proposals for new methods of amending the Constitution. The body of the report considers four key aspects of the amending process: the initiation of amendments, the content of proposed amendments, accommodating the varied visions of Canadian federalism, and ratification or formal enactment. The Committee's conclusions relate to the amending process as it affects the First Nations, the creation of new Provinces, the division of powers, the Supreme Court, changing the amending formula itself and public participation in the amending process.

The report of the Advisory Committee on Comparative Federalism examines other experiments in federalism with a view to discerning what Canadians and, in particular, Nova Scotians, can learn from the experiences of other federations to assist us in our present Constitutional situation. Based upon inspection of other federal societies and their institutions, the Committee makes specific recommendations on the Senate, the division of powers, the Supreme Court of Canada, the amending formula and intergovernmental cooperation. Some of the Federal Government's Constitutional proposals are considered from a comparative perspective.

While there is considerable agreement between the conclusions of the Advisory Committees, there are differences of emphasis and some differences of opinion. This was expected and intended, a full exploration of the possible approaches to Constitutional problems being a major purpose of this exercise. For the conclusion to be drawn from differences between well-informed people is that there is more than one good way to tackle a problem. Knowing what those ways are can help in the resolution of problems which seem insoluble when approached from only one direction.

Canada and Nova Scotia have need of practical options at this moment in their Constitutional history. The options identified in the public consultations by the Working Committee, and in the reports of the Advisory Committees, suggest the approaches by which Nova Scotia can promote national reconciliation while safeguarding the interests of all Provinces and all Canadians.

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REPORT OF THE ADVISORY COMMITTEE ON ABORIGINAL ISSUES

REPORT OF THE ADVISORY COMMITTEE ON ABORIGINAL ISSUES

I. INTRODUCTION

The Nova Scotia Constitutional Advisory Committee on Aboriginal Issues was formed in August, 1991, to advise all three political parties in Nova Scotia on aboriginal constitutional reform issues. More specifically, the mandate given to the Committee has been "to develop a range of realistic options for a Nova Scotia position on the Constitution which would accommodate the concerns of the Mikmaq people of Nova Scotia, while taking into account the constitutional concerns of the aboriginal people in Canada as a whole".

The Committee has been co-chaired by Mary Ellen Turpel and Fred Wien, both of Dalhousie University. Its members have included representatives of the following Mikmaq organizations: the Native Council of Nova Scotia (representing non-status Indians and off-reserve aboriginal people), the Native Women's Association of Nova Scotia (representing the interests of aboriginal women in the Province), and the Union of Nova Scotia Indians (representing eight Cape Breton and Mainland bands and 80 per cent of the status Indian population). The Confederacy of Mainland Mikmaqs, (representing five Mainland bands and 20 per cent of the status Indian population), has not participated in the Committee's process, although they were invited to do so. However, representatives of the Confederacy did meet with the Co-Chairs to discuss their perspectives on constitutional reform early in the Committee's deliberations.

By way of record, Appendix II to this volume gives the composition of the Committee, and Appendix III details the dates and places of Committee meetings in the August-November period.

II. PRINCIPAL ISSUES OF CONCERN

Throughout the course of our meetings, members of the Committee have been concerned not only with issues of a constitutional nature, such as the aboriginal and treaty right of self-government, but also with issues of process----for example, the relationship of the Advisory Committee to the Provincial Government, and the manner in which the constitutional positions of the Mikmaq can best be developed and articulated. Thus this Report will deal with both the procedural and the substantive concerns which have been the focus of our discussions.

Since the Committee's first meeting on August 20, 1991, members have addressed their attention to three issues of central importance to Mikmaq people and to Mikmaq organizations in Nova Scotia. These are the ongoing struggle for the recognition of Mikmaq rights, the importance of direct Mikmaq representation in the constitutional debate, and the right to self-government.

A. The Struggle for Mikmaq Rights

The first issue which has been the focus of the Committee's deliberations is the struggle, in which Mikmaq organizations have been engaged for decades, with both the Province of Nova Scotia and the Federal Government to have Mikmaq aboriginal and treaty rights recognized. While there have been a number of path-breaking court decisions, such as Simon (1985) and Denny, Paul (1990), these have been at considerable expense, requiring the Mikmaq to litigate for some acknowledgement of their rights in Nova Scotia.

Nova Scotia provincial governments have not been supportive or generous in recognizing Mikmaq aboriginal and treaty rights, although Nova Scotia has recently recognized a Mikmaq aboriginal right to harvest wildlife for food, subject to the needs of conservation and safety. After Denny, Paul and the moose harvesting prosecutions, the Province did recognize hunting rights on a "with prejudice" basis in a Conservation Agreement with the Mikmaq. The Province later publicly confirmed this recognition on Treaty Day, October 1, 1990.

The recognition of the aboriginal right to harvest wildlife has been a rare exception in the ongoing struggle to have aboriginal and treaty rights honoured. Lack of progress has led to very high levels of frustration. The federal government has consistently, since 1975, rejected a comprehensive land claim from Nova Scotia. Some Mikmaq organizations, in fact, are on the verge of major and complex land claims litigation, as the negotiation of land, resource and self-government issues with the federal and provincial governments has proven fruitless.

Taxation and trade matters are examples of current issues that have led to needless friction with the Provincial Government. The Province agrees that gasoline and diesel fuel should be delivered to reserves free of provincial taxes, as is the case with respect to the Goods and Services Tax, yet this right is not implemented. The Province agrees the Mikmaq should be able to purchase goods off-reserve, free of the provincial sales tax, but will not make the exemption available at the cash register. The Union of Nova Scotia Indians has prepared a Tobacco By-Law to regulate tobacco on reserve. The federal Indian Taxation Advisory Board enthusiastically supports such a concept but the Province rejects it out of hand. The Province imposes tobacco quotas on reserve communities, yet acknowledges that such quotas are probably illegal. The Treaty of 1752 provides that treaty beneficiaries "shall have liberty to bring for Sale to Halifax or any other settlement within this Province, Skins, feathers, fowl, fish or any thing they shall have to sell, where they shall have liberty to dispose thereof to the best advantage." Yet the Province refuses to recognize the Treaty or the trading right it specifies.

With this extensive and frustrating background of relations with the Province concerning aboriginal and treaty rights and their constitutional implications, members of the Constitutional Advisory Committee made it clear in the meetings that they do not accept the view implied by the mandate of the Committee that the Province is not already aware of the constitutional issues, and aboriginal perspectives on them. Committee members were frustrated by the one-way flow of information during our deliberations from Mikmaq people to the Province without a reciprocal exchange of views and information

coming from the Province. They expected the advisory process to proceed in good faith with a flow of information in both directions. The advisory process could also have been facilitated by Provincial recognition (absent so far) of the right to self-government and recognition of the right to have direct Mikmaq representation at the table when constitutional issues are discussed. With these principles as a foundation, the Committee could have spent its efforts addressing the more complex issues of structuring and implementing self-government and representation.

Members of the Committee view the constitutional discussion process as an opportunity for the Province to break with the past and adopt a non-adversarial approach to Mikmaq rights. With this in mind, our Report makes some recommendations in the concluding section on how a more satisfactory process of discussion on constitutional issues can be carried out in the future.

B. Direct Mikmaq Participation in the Constitutional Debate

The second theme that surfaced throughout the Committee's work was the principle that Mikmaq people must directly represent their interests in any constitutional reform process. No other organization, whether it be aboriginal or non-aboriginal, national or regional, can speak for Mikmaq people. Mikmaq people must speak for themselves.

The historical basis for this position lies in the fact that the Mikmaq are, and have been, an aboriginal First Nation of Atlantic Canada, a society with their own history, language and other forms of culture, and their own system of government. They are distinct not only from European immigrants, but also from other First Nations in Canada. The Mikmaq negotiated and signed a series of treaties with representatives of the British Crown in the 1700's, out of which flow mutual rights and obligations that have not been extinguished. Since aboriginal and treaty rights are central to the current constitutional debate, it follows that only the Mikmaq can represent their interests in constitutional discussions.

During the period 1983-87, when the First Ministers were discussing the meaning of aboriginal and treaty rights in Section 35 of the Constitution Act, 1982, Mikmaq people were not represented. Only "national" aboriginal organizations were invited to the table by the Prime Minister, despite the strenuous objections of the Mikmaq. Representatives of the Mikmaq Grand Council have since petitioned the United Nations Human Rights Committee, arguing that Canada was in violation of its international human rights obligations under the International Covenant on Civil and Political Rights because of its failure to allow Mikmaq people to speak directly on constitutional reform issues in this process.

The Mikmaq insistence on their right to participate directly in constitutional and public affairs through freely chosen representatives was clearly articulated by Kevin Christmas from the Union of Nova Scotia Indians in his presentation to the Nova Scotia Working Committee on the Constitution:

"We, the Micmac nation, were denied the right to participate as a nation in the deliberation of rights and freedoms that directly impact us. We

have to go to the Assembly of First Nations, we have to go to other non-Indian governments and organizations for our voice to be heard. So, we thought that was an outrage. I can trace back treaties, compacts, agreements from 1610 right up until 1982 that show and demonstrate that the Micmac nation has a unique set of rights that are not held by any other nation in North America. These treaties and agreements that we have signed, the covenant chain of rights and treaties that we agreed to, are unique and it goes right to the heart of who we are.

Now, we had to go and complain to the United Nations Human Rights Committee because our argument was that it was racist for the Canadian Government to tell us that these rights and obligations and privileges are being defended or argued for by a status Indian organization. When a status Indian organization represents you, you lose your identity, you lose your national status. Our nation complained through our Grand Council to the United Nations and in November..... the U.N. Human Rights Committee will be putting forward a statement, and under Article 27 of the International and Civil Protocol, they will be informing Canada that the Micmac nation has a right to participate in the public affairs of this nation, as a society, a tribal society and that the Micmac nation has a right to participate in any discussion related to their legal constitutional status in this country, direct participation.....

So, our basic position in terms of the constitution and self-government for our peoples is that the Canadian Government must find some way to meet with our leaders as a nation. Our traditional territory impacts on five provinces. Our traditional territory includes the Gaspé' of Quebec, the Province of New Brunswick, the Province of Prince Edward Island, the Province of Newfoundland and the Province of Nova Scotia. That is our traditional territory and that is where our governments are found, encompassing that whole area, we are one nation within that area. Our 33 chiefs speak for that nation. Our Grand Council represents our nation internationally. Who do we talk to? Who, in the Canadian Government, is empowered to speak with us about our constitutional rights? Everybody else is speaking for us. We are not speaking for ourselves in this process."¹

The mechanism for articulating a Mikmaq position on constitutional reform issues is through extensive, grassroots, consultation within the community. The perspective that is developed through such consultations must then be articulated directly by the Mikmaq political leadership in all relevant constitutional forums, both provincially and federally.

It should be noted that one of the process issues that will need to be discussed in these meetings is the manner in which Mikmaq consent to proposed constitutional changes

¹ Presentation by Kevin Christmas, Union of Nova Scotia Indians, to the Hearing of the Nova Scotia Working Committee on the Constitution, Shubenacadie (Indian Brook Reserve), Tuesday, October 8, 1991. Nova Scotia Hansard Reporting Services.

will be obtained. The Beaudoin-Edwards Committee, in its report on The Process for Amending the Constitution of Canada has stated that: "In order to protect the aboriginal and treaty rights which the Canadian Constitution guarantees to the aboriginal peoples of Canada, we recommend that any amendment to the Constitution of Canada directly affecting the aboriginal peoples require the consent of the aboriginal peoples of Canada"². This raises the issue of identifying the appropriate process through which consent will be obtained. The model of treaty making as a route to constitutional reform was raised with the Beaudoin-Edwards Committee by both Viola Robinson of the Native Council of Canada and by George Erasmus from the Assembly of First Nations, and this approach may also be favoured in the Nova Scotia context.

C. The Right to Self-Government

What are some of the constitutional issues that are likely to emerge from this process of consultation? Discussions within the Advisory Committee, and presentations made to the Working Committee on the Constitution when it held hearings at Eskasoni and Indian Brook, give some indication of constitutional concerns. They include the issue of safeguarding the Mikmaq language, the matter of Mikmaq representation in provincial and federal legislatures, equality rights for Mikmaq women, the application of aboriginal and treaty rights to all Mikmaq people regardless of the status/non-status distinction or their place of residence, and the division of federal/provincial powers and equalization arrangements. The overriding issue, however, and one that has a bearing on most, if not all, of the topics raised above, is the issue of self-government and its entrenchment in the Canadian constitution.

(i) Background

All Mikmaq organizations are agreed on the principle that the right to self-government must be recognized and entrenched in the Canadian constitution. The historical roots of the right to self-government go back to the pre-European era in North America when the Mikmaq nation was self-governing in both its internal and external affairs. Self-government is therefore one of several inherent aboriginal birth rights. This includes "those rights that inhere in a collectivity or community of peoples by virtue of their status as the original inhabitants of a specific territory"³. Acting as a self-governing, autonomous nation, the Mikmaq negotiated commercial and defence arrangements with France and Britain; they received Catholicism under a concordat with the Holy See in 1610; and they were the first nation to recognize the independence of the U.S.A. under a military assistance treaty of 1776⁴.

² The Process for Amending the Constitution of Canada: The Report of the Special Joint Committee of the Senate and the House of Commons, Ottawa: The Queen's Printer for Canada, June 21, 1991.

³ Native Women's Association of Canada, "An Overview of Aboriginal Constitutional Discussions and Treaty Issues", Ottawa, May, 1987

⁴ Mary Ellen Turpel, "Aboriginal Peoples' Status in Canadian Constitutional Reform Processes", prepared for the Canadian Bar Association Task Force on Constitutional Amendment Process, June 28, 1991. Faculty of Law, Dalhousie University, Halifax, Nova Scotia.

As noted above, in the 1700's the Mikmaq also negotiated a series of peace and friendship treaties with the British Crown. These were treaties signed by equals, not by a vanquished people, and their spirit is described by the Mikmaq in the following terms:

"Well before the arrival of the Europeans, formal agreements equivalent to treaties were negotiated between sovereign nations of North America. The meaning and effect of these arrangements were not limited by a few words on paper as are present-day business contracts. Rather, these treaties were living and evolving relationships among various indigenous nations. Like the members of a family, representatives of the nations that had entered into a treaty met from time to time to exchange gifts, forgive one another and renew their friendship. We, the Mi'kmaq, related to Europeans the same way.

The eighteenth century agreements between the Mi'kmaq nation and Britain were, and still are, regarded by us as a form of brotherhood. When there was some injury or threat of conflict we met to exchange reassurances and renew our engagements. That is why, over several decades, one finds half a dozen or more seemingly separate treaties between the Mi'kmaq and the British Crown. The surviving documents are often incomplete summaries of meetings that typically required many days and were repeated every few years as necessary. By themselves, the documents are fragments; considered together, they constitute a great chain of agreement. In other words, the treaty documents..... should be seen not as distinct treaties but as stages and renewals of a larger agreement or pact that developed during the 1700's between the Mi'kmaq and the British.....

We have fulfilled our only agreement to date: to remain friends and allies of the British Crown and to live in peace with all of his or her subjects. At Confederation, the Mi'kmaq nation was not afforded the opportunity to join Canada on its own terms, in its own time, and by mutual agreement as were the provinces. Clearly, our present situation is a product of this oversight" ⁵.

Typically, the treaties held that the fishing, hunting and fowling activities of the Mikmaq and other signatories were explicitly recognized and guaranteed. Also, land rights were to be protected in exchange for a commitment to cease hostilities, accept existing British settlements and return British prisoners. Nowhere in the treaties, however, is the right to govern themselves given up by the Mikmaq, nor has that right been given up subsequently whether by agreement, military conquest, or in any other way. Indeed, the treaty making process, by implication, recognizes that each party is a self-governing collectivity for a community of people.

⁵ The Mi'kmaq Treaty Handbook, Native Communications Society, Sydney and Truro, 1987

The chief of the Indian Brook band expressed his views on self-government in the following terms, in a recent speech to the Premiers of the Atlantic Provinces:

"We see our right of self-government as an inherent right. It does not come from you as Premiers or from your provincial governments. It does not come from the federal government. The right of self-government comes from the Mikmaq people.

Since long before the first contact with the Europeans, the Mikmaq have been self-governing. We have always had our own governments, and we have been members of confederacies, like the Wabenaki confederacy. The Wabenaki confederacy is a historical model of the Council of Atlantic Premiers. Long before your ancestors ever came to our homelands, we came together with other First Nations in this region and formed alliances. I guess you could say that we invented the idea of Maritime or Atlantic cooperation.

When I say that our right to self-government came from the Mikmaq people, I mean it is our birthright. As a people, we have never given up our right of self-government. In fact the responsibility is on those who believe we have given up this right to show us where and when this happened.....Our right to self-government has been suppressed in Canada and in the Atlantic Provinces. This does not mean we have given it up.

When we talk about the inherent right, many of you think it is too abstract and want a definition. We cannot give definitions because the right cannot be defined as anything more than our birthright as the first peoples to this territory.

If you would like an example of the Mikmaq inherent right to self-government, I will give it to you. From 1725-1761, the Mikmaq people entered into treaties of Peace and friendship with the British Crown. We entered into these treaties as independent parties. Our authority to sign the treaties did not come from the British Crown. It came from our people.

The colonial authorities got their authority from the British Crown. We did not. Our treaty of 1752 has been recognized by the Supreme Court of Canada as a valid treaty still in force in Canada. This treaty is a continued expression of our inherent right of self-government. We agreed not to molest your settlements in 1752 in exchange for recognition of our hunting rights and other rights.

In the treaty of 1752 we did not give up our land. We did not say we will no longer govern ourselves. We agreed to stop threatening your settlements because we are peaceful people.

Self-government can mean, in 1991, a process of interpreting this treaty in a modern context. Our rights which flow from it are recognized,

and they are still exercised. However, your governments have not taken the time to understand what this treaty means in terms of your obligations. Self-government could start with a process of interpreting the treaty of 1752 and to build on it an understanding of a political relationship between Mikmaq people and the Crown.

We need to have more discussions about your obligations and our rights. However, in order for these discussions to be worthwhile, you must recognize that our right to self-government is inherent to us. It does not come from you or from the federal crown.

We must have a forum where our rights are respected and we are treated as political equals (so) that a new relationship between the Mikmaq and the Provinces or Federal government can be forged" ⁶.

The additional point to be made is that the recognition of Mikmaq self-government represents not only the recognition of a historic and continuing aboriginal right. It also provides a means of addressing contemporary issues and social problems that affect Mikmaq communities. The contemporary exercise of self-government, recognized and protected by the constitution, will give the Mikmaq the freedom from imposition, interference and dependence that has so oppressively been reflected through institutions such as the Indian Act and the Department of Indian Affairs. It will provide the breathing room that is required by the Mikmaq so that they can put in place their own laws, institutions and practices in fields such as education, human services, justice, cultural and language survival, and economic development.

(ii) The 1986 Constitutional Treaty Position

Readers of this report will be interested in knowing what the details of Mikmaq self-government are likely to be. What areas of jurisdiction are to be assumed? What revised relationships would be put in place with provincial and federal governments? How will the rights of self-government be exercised off-reserve? What will be the economic and financial basis for aboriginal self-government? They may also want to know how the right to self-government will be reflected in the constitution. What is the wording of the self-government clause that is preferred by the Mikmaq? Will the Charter of Rights apply within aboriginal communities? How will the rights of women be protected? Is it essential that the word "inherent" be included in the proposed clause?

Answers to these questions cannot yet be provided because they depend in the first instance on the completion of an extensive consultation process within the Mikmaq community. They depend also on a process of direct dialogue and negotiation between the Mikmaq and the elected leaders of the provincial and federal governments. Nevertheless, some indication of the Mikmaq approach to these issues is given by the Union of Nova Scotia Indians' Constitutional Treaty Position, which was approved in December, 1986.

⁶ "Address by Chief Reg Maloney to the Atlantic Premiers Meeting", Summerside, P.E.I., October 29, 1991

It is important to note that this document, which is reproduced in its entirety in Appendix III, does not represent the current constitutional position of the UNSI nor of other Mikmaq organizations; the document has not been revisited and updated, nor can it be until the consultation process referred to above has been completed. Nevertheless, the 1986 document is important because of its content and the fact that it was approved by all of the chiefs of the Mikmaq bands in Nova Scotia (acting as the Board of the UNSI in the period prior to the formation of the Confederacy of Mainland Micmacs). It was also approved by the members of the Mikmaq Grand Council, the traditional ceremonial and spiritual leaders of the Mikmaq nation.

In broad outline, the 1986 proposal establishes four goals for the amendment of the Canadian Constitution Act. These are:

- "(1) recognition of the legal personality of those aboriginal nations and governments already acknowledged by treaty;
- (2) limitation of the powers of the Federal and Provincial governments over aboriginal communities
- (3) immediate vesting of specific powers of self-government in aboriginal peoples, subject only to subsequent agreements with the Crown; and
- (4) including aboriginal governments in national equalization formulas, without prejudicing other financial entitlements." ⁷

The proposal goes on to suggest specific wording changes to Section 35 of the Constitution, including an amendment to the consent provision of Section 35 requiring the Government of Canada to obtain the consent of each treaty group to any alteration of the aboriginal peoples' legal rights and status in Canada.

The document also describes an option for Mikmaq self-government (see Appendix III), outlining a Mikmaq system of government and describing in general terms the responsibilities of Mikmaq bands, a Mikmaq Regional Authority, and the Grand Council. The self-government proposal is based on the following principles:

- "(1) Any agreement with Canada recognising Mikmaq self-government must respect and be in the context of the Treaty of 1752 i.e. a clarification of the treaty relationship rather than an extinguishment of it.
- (2) Any self-government agreement must include a formula assuring a secure and predictable financial foundation for Mikmaq education and social welfare.

⁷ "Union of Nova Scotia Indians Constitutional Treaty Position", Union of Nova Scotia Indians, Sydney, Nova Scotia, December, 1986.

(3) Any self-government agreement must assure Mikmaqs some form of direct representation in the governments of Nova Scotia and Canada.

(4) Any self-government agreement must give Mikmaq people the opportunity to continue to develop and change their political institutions as they see fit." ⁸

We wish to reiterate, however, that the constitutional position described above and in more detail in Appendix III is the position as it was in 1986. Discussions regarding the development of a current position have begun with a process of internal dialogue involving the Union of Nova Scotia Indians, the Native Council of Nova Scotia, and the Mikmaq Grand Council. The process of discussion is referred to by the Mikmaq term "Mawiwo'kutinej", meaning the process whereby the people get together in the traditional way to talk and express what they think and how they feel. The Native Women's Association of Nova Scotia is also engaged in a process of clarifying its constitutional concerns. The organizations expect to engage in a political dialogue with the Province at the level of the political leadership, including the Premier, and indeed two meetings were held in October, 1991.

(iii) The National Debate

The Constitutional Advisory Committee has also reviewed the recent federal government's constitutional proposals, as outlined in the document "Shaping Canada's Future Together". The Mikmaq organizations represented on our Committee have not yet taken a position on the federal proposals. There is, however, an ongoing national debate about the federal document, and three national aboriginal organizations (the Assembly of First Nations, the Inuit Tapirisat of Canada, and the Native Council of Canada) have raised the following concerns (among others) about the provisions relating to self-government. We emphasize that the views are those of the national organizations and do not at this time represent the views of the Mikmaq. The following represents potential concerns and are not necessarily shared by the Mikmaq. Indeed, some organizations, such as the Assembly of First Nations, are still consulting with aboriginal leaders and through constitutional circles, so even for the AFN these views are preliminary.

The national organizations have noted, for example, that the federal proposals were developed without the involvement of aboriginal peoples. The federal proposals were prepared by federal government bureaucrats, accepted by the Unity Cabinet Committee, and then distributed to the Canadian public. There has been no opportunity for aboriginal input into this process.

The national organizations also expressed specific concerns with the federal government's proposal to entrench a general justiciable right to aboriginal self-government within the Canadian federation. This proposal is unacceptable because it does not recognize the inherent right of aboriginal peoples to govern themselves. The inherent right is a

⁸ Ibid

significant concept because it underscores the fact that it is aboriginal peoples who are the source of the right of self-government and not the Canadian government. The national organizations are concerned with the fact that the right would be "entrenched". This is of concern because aboriginal peoples assert that the right already exists and that it is not a new concept. It would be preferred that an inherent right to self-government were "recognized".

The federal proposal of delaying the enforceability of the right of self-government for up to ten years is also problematic. This was criticized since the recognition of Quebec as a distinct society is not proposed in such a manner as to delay its enforcement. Why then would aboriginal self-government be delayed?

Another issue is raised by the federal proposal which contemplates that the aboriginal right of self-government would be defined prior to entrenchment. The national organizations believe that the right of self-government involves, at minimum, a land base for aboriginal people, political institutions for aboriginal people, and recognized jurisdiction for aboriginal governments. In addition, fiscal resources and a secure financial base for aboriginal government services is required. The issue of land is not addressed whatsoever in the federal proposals. This is seen as unacceptable when, in another part of the federal proposals, it is suggested that the right to property be constitutionally entrenched. The national organizations believe that aboriginal property rights must be recognized as a matter of priority.

Again, it should be emphasized that these views, expressed by the national aboriginal organizations, are neither accepted nor rejected by the Mikmaq of Nova Scotia.

III. CONCLUSION: THE FUTURE PROCESS

We have noted in earlier portions of this Report some of the frustrations experienced by the Mikmaq organizations and their delegates to the Constitutional Advisory Committee with the Advisory Committee's mandate and process. In conclusion, we make several recommendations about the manner in which future ongoing discussions about aboriginal constitutional issues should be organized.

Firstly, it is the firm view of the Committee that the proper form for a discussion of constitutional options is a political one where senior representatives of the Provincial Government, including the Premier, would meet regularly with Mikmaq leaders. The Advisory Committee could not perform this role since its members were simply a body of designates from Mikmaq organizations. Such meetings of political leaders, as proposed, can be a forum to review constitutional options most preferred by Mikmaq people. They need to be arranged as a matter of priority.

The Mikmaq are developing their constitutional position. This position will only be arrived at after internal consultations within the Mikmaq community. Once this position is determined, the Mikmaq will in any event make their views known to the Province, the Federal Government, the Assembly of First Nations, and others. The Mikmaq nation has

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Firstly, it is the firm view of the Committee that the proper form for a discussion of constitutional options is a political one where senior representatives of the Provincial Government, including the Premier, would meet regularly with Mikmaq leaders. The Advisory Committee could not perform this role since its members were simply a body of designates from Mikmaq organizations. Such meetings of political leaders, as proposed, can be a forum to review constitutional options most preferred by Mikmaq people. They need to be arranged as a matter of priority.

The Mikmaq are developing their constitutional position. This position will only be arrived at after internal consultations within the Mikmaq community. Once this position is determined, the Mikmaq will in any event make their views known to the Province, the Federal Government, the Assembly of First Nations, and others. The Mikmaq nation has

its own voice and will speak for itself. Meanwhile, the Committee believes that the Province should (1) in its own interest, begin the political dialogue with the Mikmaq leadership and (2) not develop any firm positions inconsistent with Mikmaq views without being sure that it understands the Mikmaq position. We believe that the Premier, the Cabinet, and others with constitutional decision-making powers should be sure they are well informed on the Mikmaq perspective before committing themselves to a public position on aboriginal constitutional issues.

Secondly, it is very important that sufficient time and resources be made available so that grassroots, community-level consultations about constitutional options can be carried out. Such consultations are essential for the development of a Mikmaq constitutional position, and financial support from the Provincial Government is required in order for these consultations to take place.

Thirdly, it has become clear from the hearings of the Working Committee, from the Report of the Spicer Commission, and from other sources that the Nova Scotian, and the Canadian, public is very poorly informed about, but interested in, aboriginal constitutional concerns. If a satisfactory resolution of these concerns is to be achieved, it is important that the public be well informed about the background to the issues under discussion and about the positions being taken by their governments and by aboriginal organizations. We recommend, therefore, that explicit attention be given to an ongoing process of public education as the constitutional debate continues to unfold.

APPENDIX I

UNION OF NOVA SCOTIA INDIANS

CONSTITUTIONAL TREATY POSITION

**(Adopted by the Union of Nova Scotia Indians and by the Mikmaq
Grand Council in December, 1986)**

CONSTITUTIONAL AMENDMENT PROPOSAL

Commentary

In our view, it is both essential and sufficient for amendment of the Constitution Act to achieve four goals:

- (1) recognition of the legal personality of those aboriginal nations and governments already acknowledged by treaty;
- (2) limitation of the powers of the Federal and Provincial governments over aboriginal communities;
- (3) immediate vesting of specific powers of self-government in aboriginal peoples, subject only to subsequent agreements with the Crown; and,
- (4) including aboriginal governments in national equalization formulas, without prejudicing other financial entitlements.

We say these goals are essential because we cannot accept anything less from Canada. They are sufficient because they guarantee aboriginal peoples adequate legal power and resources to negotiate any subsequent "fine-tuning" agreements, or claims settlements, particular groups may desire.

An amendment that merely commits Canada to further negotiations amounts to little more than rhetoric. Canada would have no legally-enforceable obligation to give up any power or resources, or negotiate in good faith. Negotiations could continue indefinitely. The time to agree on a general formula for sharing power is now -- and it will give Canada and the Provinces an incentive to negotiate specific fine-tuning arrangements later.

Our proposed Constitutional text begins by amending the consent provision of sec. 35, as it now stands, to require the Government to get the consent of each treaty group to any alteration of aboriginal peoples' legal rights and status in Canada. It thus recognizes that treaties created relationships between governments that still exist.

Our draft text then provides, as sec. 35(5), a general formula for power-sharing, in which aboriginal governments replace the Provinces within aboriginal territories. In addition, we would expressly limit the Federal government's ability to interfere with aboriginal governments. The heart of this proposal is the idea of limitation. It will be pointless to "recognize" aboriginal self-government without limiting other governments' power over our people. Just adding aboriginal laws to all of the other laws our people have to follow would be oppression, not freedom.

In the area of financial resources, we propose a new sec. 35(6) to include aboriginal governments in the Provincial equalization formula with three important provisos. First, aboriginal governments should be able to count all of their members, whether they live on

or off-reserve. We do not want to support the idea that Indians lose their rights or status the moment they step off Indian land.

Second, it is important to establish, as a target for Federal revenue-sharing, the equalization of aboriginal government's fiscal capacity with the fiscal capacity of Provinces. In other words, the formula should be weighted to truly equalize the ability of aboriginal governments and Provinces to provide basic human services.

Lastly, it is of course wise to make sure that equalization payments are not simply deducted from any other payments Canada may be making to aboriginal peoples, as for example according to the terms of treaties or land claims settlements.

The final element of our proposed text, appearing as new sec. 35(7), is a broad acknowledgement of the right of aboriginal peoples to renegotiate any of these power-sharing or revenue-sharing principles, on a case-by-case basis. Negotiations are specified with "the Crown" because particular kinds of agreements may need only be with Canada, or with a single Province, while others may need to be trilateral or may involve several Provinces. Once renegotiated, arrangements of this kind should certainly be just as "entrenched" and irrevocable as the Constitutional section itself.

Thus we propose to divide power and financial resources with Canada immediately, always subject to subsequent agreements made with particular tribes or bands, rather than simply leaving everything to subsequent agreements. Unless we use the Constitutional exercise to obtain some enforceable rights, we will be going into regional negotiations with absolutely no bargaining power whatever.

That explains what we think the Constitutional talks should accomplish. The Constitutional talks should not become a forum for the resolution of land claims. That is strictly a regional matter, involving diverse situations, differing Provincial circumstances, and considerable economic and ecological complexities. Attempting to deal with land claims at the Constitutional level will simply doom the whole process to failure -- and to both Provincial and aboriginal opposition. On the contrary, we will be in a much better position to resolve land claims on a regional basis after our own aboriginal governments have been given secure legal status, specific powers, and a reasonably stable basis of funding.

CONSTITUTIONAL AMENDMENT PROPOSAL

- sec. 35(1). [DELETE "existing"]
- sec. 35(4). [ADD]
Consent shall be required individually of each nation or tribe recognized by treaty.
- sec. 35(5). [NEW]
Self-government is an aboriginal right. Except as may be agreed in accordance with subsection (7) of this section,
- (a) governments established by aboriginal peoples may exercise any of the powers enumerated in section 92 of the British North America Act;
 - (b) no Province shall exercise jurisdiction over the territories administered by aboriginal governments;
 - (c) the Government of Canada shall not exercise any of its responsibilities under section 91(24) of the British North America Act in such a manner as to impair this right or restrict its enjoyment.
- sec. 35(6). [NEW]
In any sharing of national financial resources by the Government of Canada, aboriginal governments shall be entitled to participate on the basis of their entire membership irrespective of residence, and to the extent necessary to equalize their fiscal capacity with that of the provinces, disregarding any payments to which aboriginal peoples may otherwise be entitled by virtue of treaty rights or the settlement of claims.
- sec 35(7). [NEW]
The powers, financial entitlements, and territorial extent of aboriginal governments may be altered by agreements between aboriginal governments and the Crown, which shall thereafter be entrenched and irrevocable without aboriginal consent.

AN OPTION FOR MIKMAQ SELF-GOVERNMENT

Basic Principles

1. Any agreement with Canada recognizing Mikmaq self-government must respect and be in the context of the Treaty of 1752, i.e. a clarification of the treaty relationship rather than an extinguishment of it.
2. Any self-government agreement must include a formula assuring a secure and predictable financial foundation for Mikmaq education and social welfare.
3. Any self-government agreement must assure Mikmaqs some form of direct representation in the governments of Nova Scotia and Canada.
4. Any self-government agreement must give Mikmaq people the opportunity to continue to develop and change their political institutions as they see fit.

Distribution of Responsibility

In general terms, this option continues bands' administrative and priority-setting role, affording them much the same responsibilities as the traditional Mikmaq districts and district chiefs. Each band would remain an autonomous, self-governing part of the Mikmaq Nation.

The Union would become a Mikmaq Regional Authority -- not a government, but a central technical secretariat for the bands and the Grand Council. Overall policy would continue to be set by an annual general assembly of all Mikmaq people (with voting by band chiefs and councils). Action on advocacy or technical assistance would be taken only at the request of the assembly, or as directed by a BCR. Liaison with bands would be via band chiefs. As the MRA would have no policy-political role, there would be no need for a board of directors.

The Grand Council would assume, more explicitly, its function as the embodiment of Mikmaq sovereignty and keeper of treaty relationships. It would represent Mikmaq in dealings with the Crown, foreign nations, and the Church, and give advice to the MRA and bands, but have no power to make laws or contracts on its own initiative, and would have no budget. In many respects it would become the "privy council" of the nation, and represent "the Crown in right of the Mikmaq nation."

There would be no continuing role for DIAND in Mikmaq affairs. All funding would be by formula, with agreed percentages going to the MRA and to each of the bands. (This is fundamental to the practicability of the proposal.) The MRA and bands would be accountable directly to Treasury Board under the terms of the self-government agreement. Decisions would not require the approval of the Minister.

Provincial authority over Mikmaqs would necessarily be restricted by taking the MRA and bands out of sec. 88 of the Indian Act. At the same time, Mikmaqs have a legitimate interest in Provincial as well as Federal legislation, especially budgets, and therefore must have more direct representation in the Provincial and Federal legislatures. We propose that elected Mikmaq officials have automatic seats in the Nova Scotia Legislative Assembly and the Federal Parliament; chiefs to be MLAs and the President of the MRA to be an MP. We recognize that this might require constitutional amendments, and suggest as an interim step the appointment of the MRA President as a Federal Senator.

Powers and Funding

This option follows the general outlines of our Constitutional proposals with regard to power-sharing and revenue-sharing. In brief, this means:

- Provincial sec. 88 powers are restricted to areas of subsequent agreement;
- Federal supervisory authority under the Indian Act is restricted to areas of subsequent agreement as well;
- Bands or, at their request the MRA, may exercise the same range of powers and jurisdiction over Mikmaq territory as a Province;
- Mikmaqs as a whole should receive, as part of an agreed formula, an annual financial grant based on the total number of Mikmaqs on or off-reserve, adjusted by the same factors that apply to the Provincial equalization system, and further adjusted so as to equalize the per capita fiscal capacity of Mikmaq governments and Nova Scotia;
- Individual bands would remain free to make additional agreements with the Federal or Provincial governments, consistent with this arrangement as a whole.

Territory and Claims

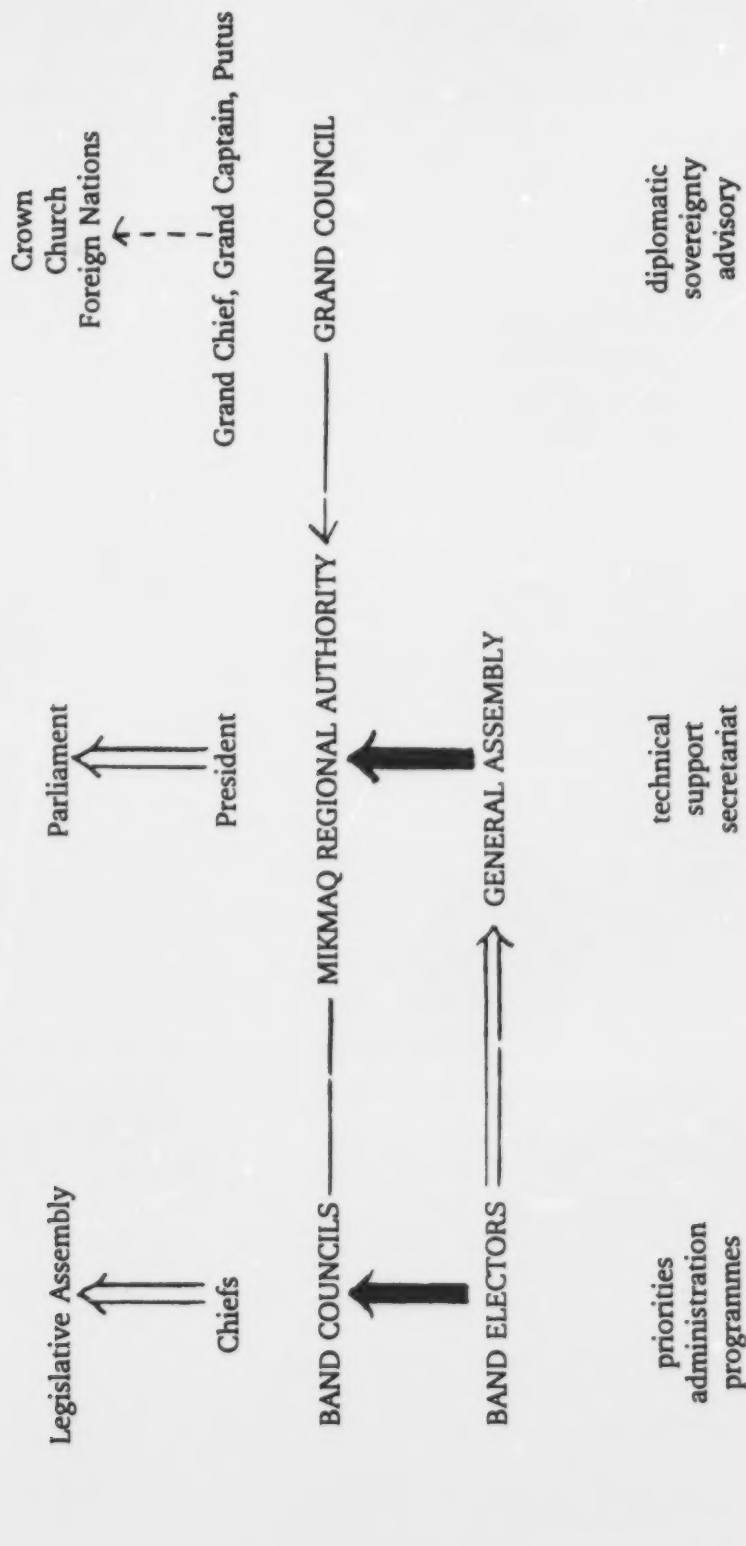
The geographic areas to be administered by Mikmaqs would include all of the recognized reserves in Nova Scotia, any reserves which have never been lawfully surrendered, and any Crown lands or other resources which may subsequently be recognized as Mikmaq property as a result of claims. Off-reserve treaty activities such as hunting and fishing would also be included.

A self-government agreement would neither resolve nor extinguish any aboriginal or treaty claims, nor foreclose further agreements enlarging the geographic area or responsibilities of Mikmaq government.

Adhesions

The initial agreement will apply to Nova Scotia, but should include a procedure by which Mikmaq bands in other Provinces may subsequently choose to join, on an equal footing.

RE-ORGANISATION OF MIKMAQ GOVERNMENT



**REPORT OF THE ADVISORY COMMITTEE ON
CHARTER OF RIGHTS,
WOMEN'S, BILINGUAL AND MULTICULTURAL ISSUES**

EVALUATING THE CHARTER OF RIGHTS AND FREEDOMS

**REPORT OF THE ADVISORY COMMITTEE ON
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EVALUATING THE CHARTER OF RIGHTS AND FREEDOMS**

SUMMARY

This paper recognizes that the Canadian Charter of Rights and Freedoms focuses primarily on individual rights; and recommendations that collective rights embodied within it be affirmed and strengthened.

In particular, the Committee recommends that the distinct society status, as outlined in the recent federal proposal, be adopted. The Committee recommends against including property rights in the Charter. The Committee recommends that aboriginal land claims be treated as paramount in discussing native rights under s.25 and s.35 of the Constitution. The Committee recommends that consideration be given to adopting a socioeconomic Charter. This is of particular concern to Nova Scotians who face the prospect of diminishing transfer payments to support their social services. The Committee also recommends that consideration be given to adopting a Charter on environmental rights and that the constitutional guarantees of multiculturalism in s.27 be given more weight. A change in s.33 is not recommended.

PREFACE

The reason for enshrining certain values in the fundamental law of a constitution is to prevent the abuse of power: by making modifications possible only via a special and difficult procedure, the policy prevents governments and legislatures from enacting swift or radical changes. With the Charter, Canadians have redressed the potential abuse of their rights.

In permitting a judicial review of laws created by the legislatures of Canada, it could be argued that the Charter runs counter to "democracy". Democracy truly means rule by the people, but is often confused with the protection of individual rights, which is a tenet of what could be called liberal democracy.¹ It has been argued:

... the effect of the Charter, as interpreted by our courts, has been to render our politics more liberal and, inevitably, less democratic. As a result, collective gains made by Canadians through the political process have been swept away in the name of individual rights. The Charter, more precisely, has been the means whereby parliamentary government has been undermined, corporations have acquired unprecedented legal rights, and popular organizations, particularly the trade unions, have been attached.

By extending to corporations all of the various rights granted to human beings in the Charter (e.g. protection from unreasonable search and seizure in Hunter v. Southam,² free expression in Quebec v. Irwin Toy Ltd.,³ and freedom of religion in R. v. Big M Drug Mart⁴), the courts have enabled the corporate sector to combat government regulation.

The two axes along which this working paper is divided are those of individual rights and collective rights. The present Charter is largely seen as the defender of individual rights of groups, principally in sanctioning affirmative action programs (s.15). It can be argued that there is an undue stress upon individual rights under the Charter, and a need for greater emphasis upon collective rights. The Charter needs to be interpreted expansively, in relation, inter alia, to welfare, education, health, housing, and employment.

¹ Robert Martin, "The Charter and the Crisis in Canada" in After Meech Lake - Constitution Reform: Charter of Rights and Freedoms (U. Western Ontario) 121, at p.122.

² [1984] 2 S.C.R. 145, at 155.

³ (1989), 58 D.L.R. (4th) 577.

⁴ [1985] 1 S.C.R. 295.

The Canadian rights culture, as manifest in the Charter, follows the American tradition of constitutional rights giving primacy to individual rights. There are, however, some clear departures from the American model in the Canadian constitution. Most important to this discussion is the assurance of s.27 of the Charter:

This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

There remains the problem of reconciling individual and community rights⁵. This was exemplified by women's groups concerns about the right of women in Quebec being eroded by the distinct society clause in Meech Lake: the Federation des Femmes du Quebec found itself in the middle of this battle, and sided with the protection of the French language and culture.

As well, rights are not self-contained: they overlap and conflict. When several individual civil rights are at stake, the protection of one may conflict with the protection of another⁶. Ought rights be prioritized according to importance? Which comes first among the competing rights of Aborigines, Women, French-speaking Canadians⁷?

Recent crises across the country (e.g. the Oka crisis, the language battles in several provinces) sharply illustrate the failure to present arrangements in Canada for reconciling liberty and order in times of trouble. Governments adopt ad hoc measures, in a reluctance to contemplate the entrenchment of basic rights in the constitution.

In the debate preceding the enactment of the Constitution Act, 1982, many argued that there was no need to spell out civil rights in a constitution, as courts, entrusted with the rule of law, were perfectly able to elaborate these rights. Western provinces, particularly Manitoba, held the view that citizens' rights were most effectively protected by the common law as enunciated by the courts. The Quebec government agreed with this position, wary as it was of an erosion of provincial legislative sovereignty, particularly in the closely guarded areas of exclusive provincial jurisdiction such as language and education.

There are forces across the country which are pushing for re-examination of the Charter. Not unlike the election of the Parti Quebecois in 1976, with its openly separatist platform, the positions currently articulated by provincial governments make it inevitable that discussion of major changes in the Canadian federal system can no longer be deferred. Whereas in the late 1970's and the early 1980's, it was Trudeau's federal government which proposed a package of civil and political rights to be included in the constitutional

⁵ F. Fournier, "Collective Rights in the Area of Equality Rights: The Canadian Scene" in (1987), Cambridge Lectures, F. E. McArdle, ed. (Y. Blair: Montreal, 1989) at 229.

⁶ A. Petter and A. C. Hutchinson, "Rights in Conflict: The Dilemma of Charter Legitimacy" (1989), 23 U.B.C. L.Rev. 531-548.

⁷ D. G. Raume and L. J. M. Green "Second Class Rights? Principle and Compromise in the Charter" (1990), 13 Dal. L.J. 564-593; see in general, L. Trakman, Reasoning with the Charter (Butterworths: Toronto, 1991).

renewal, proposals of this kind are now coming from the provinces. It is unlikely, however, that there will be a wholesale revision of the Charter, but there may be changes in the areas of Aboriginal rights, bilingualism and multiculturalism.⁸

Reference:

L. Trakman, Reasoning with the Charter (Butterworths: Toronto, 1991).

I. PROPERTY RIGHTS

Key Issues

1. Concept put forward principally by B.C. proposal.
2. What does the concept of property include?
3. Should "property rights" be enshrined in s.7 of the Charter?
4. Implications of "property rights for aboriginal rights and native claims".

The traditional conception of property stems from an era when land was most significant to the economic base of a nation and a person's liberty and status was dependent upon possession of real property.⁹ At common law property is either real or personal. Land is regarded as real property while most other kinds of property are classified as personal. Personal property includes everything from tangible personal property such as chattels and goods, and intangible personal interests such as negotiable instruments, patents, trademarks, copy rights, pledges, bills of sale, bills of exchange chose in action, goodwill and so forth. Intangible assets created by law that may be exchangeable have value, that the law protects from interference and that may be considered property include government issued or sanctioned permits or licenses that allow a business to gain a competitive advantage or at least for the purposes of compensation in expropriation cases. In the U.S. the concept of property has been expanded to such an extent that statutory entitlements and benefits such as welfare payments and government employment are now treated as property interests or "new property", the termination or cessation of which are subject to the due process protection of the 5th and 14th amendments.

In 1982, the British Columbia Legislature adopted resolutions calling for the amendment of s.7 of the Charter to include "Everyone has the right to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except

⁸ A. C. Cairns "Roadblocks in the Way of Constitutional Change" (1991), 2 Const. Forum 54-58.

⁹ Clare F. Beckton, "The Impact on Women of Entrenchment of Property Rights in the Canadian Charter of Rights and Freedoms", in the Dal. L. J., 288.

in accordance with the principles of fundamental justice."¹⁰ Two issues arise out of such a proposition, namely i) what would be included in the definition of property?, and ii) would procedural fairness requirements expand the notion of what constitutes property? Increasingly, individuals are dependent upon government largesse as their main source of subsistence, and a constitutional guarantee for administrative fairness might protect people from being deprived of government benefits without just cause, although it could not be used to require the establishment of such programs. Disadvantaged groups which presently receive government benefits fear that such an amendment would mean that they would need to engage in expensive litigation to protect the benefits they already receive, thus locking the status quo into place and encouraging governments to refrain from granting further enlarged benefits.

Both the common law and statute law afford extensive protection to property rights in Canada. For example, trespass, nuisance conversion and the laws dealing expropriation and compensation. And certainly there are provisions of the Charter notably s.2(a) Freedom of Religion, s.2(b) Freedom of the Press, and s.8 Right to be secure against unreasonable search and seizure that have the effect of extending rights to those owning property which taken together afford a measure of constitutional protection for private property.

What then is the meaning of property. Property will likely be limited to those things which the common law has identified as comprising property-land, chattels, future interests, certain contractual rights such as lease entitlements and chose in action. Since the common law has over the past decades, and indeed centuries, expanded the category of things constituting property, it would not be unreasonable to assume that the common law will continue to recognize more rights as comprising property and therefore the list of government activities to be governed by s.7 of the Charter will expand commensurately. In addition, if property did not refer exclusively to those interests recognized by the common law as being property, then it would be open to courts to construe certain vested legal entitlements such as those conferred by legislation but not previously recognized under common law as comprising property, whose deprivation by government must be carried out in accordance with fundamental justice. Examples of these include patent, copyright, trademark rights, welfare, government employment, driver's license, gun and business licenses. From this an individual would not enjoy a constitutional right to welfare but rather once an individual obtained any of these rights the government could not revoke or terminate them unless it complied with the principles of fundamental justice. The enshrinement of property rights in s.7 of the Charter would make the invoking of s.1 of the Charter quite difficult in cases where a breach of s.7 has been made out by the Charter. A government which has interfered with property rights in a fundamentally unjust matter would likely experience substantial difficulty in showing that its action, while fundamentally unjust, was nevertheless demonstrably justified in pursuit of crucial governmental objectives under s.1.

¹⁰ September 21, 1982; the New Brunswick Legislature adopted similar resolutions on July 15, 1983, and the then Progressive Conservative Opposition in Parliament on April 29, 1983.

It is reasonable to expect that Canadian courts would liberally enforce the property rights enshrined in s.7. First and foremost, Canadian judges enjoy a strong attachment to common law tradition and are, as a result, eminently skilled at and accustomed to using judicial authority effectively to protect property rights. Indeed, the protection of these rights has been absolutely fundamental to the common law. As a result of this tradition, it would not seem a radical step for courts to continue in the direction of property rights protection by a serious application of an amended s.7.

Recommendation # 1: That property rights not be enshrined in the constitution. Traditional property rights are adequately protected by common law and statute. New property rights such as a right to welfare, a right to employment, and a right to shelter can be constitutionally protected as part of a socioeconomic Charter.

Any examination of the impact of entrenching property rights in the Constitution upon aboriginal rights and native land claims must begin with ss.25 and 35 of the Constitution Act, 1982.

There has been some debate about the meaning of these provisions. Professor Hogg has suggested that s.35 does not provide constitutional protection against legislative impairments of the rights covered: Constitutional Law of Canada (2d Ed.), at p.567.

With respect to s.25, Professor Hogg has described it as "a saving provision", included to make clear that the Charter is not to be construed as derogating from "any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada".

Could the entrenchment of property rights in the Constitution alter the legal obligations of federal or provincial governments to provide the lands necessary to fulfil the terms of the Treaty? Once again, it seems unlikely that the guarantee of property rights would have greater effect than the recognition and affirmation of treaty rights in s.35. Indeed, it is possible to argue that the guarantee of property rights would, in the absence of s.35, not have any impact on governmental obligations to fulfil "treaty land entitlement".

Enshrinement of property rights should also be recognized as a potential limit on aboriginal interests protected by s.35. In addition, there is a potential for conflict between property rights protected elsewhere in the Charter and aboriginal rights under s.35 because aboriginal rights of property are usually defined as a collective right and traditional property as individual rights.

Recommendation #2: Notwithstanding Recommendation #1, any conception of property rights should be redefined so that it is consistent with the rights guaranteed to aboriginal peoples in s.25 and s.35.

Recommendation #3: The constitutional rights conferred to aboriginal peoples should be respected and advanced as collective rights on equal footing with other collective rights including those of the provinces and federal government.

II. SOCIOECONOMIC CHARTER

Key Issues:

1. What constitutes socioeconomic rights? housing, education, welfare, minimum wage?
2. Should they be included in the Charter?
3. What would be the impact on s.36 of the Constitution Act, 1982?

If the distributive ends discussed in the preface are not wrought through amendments to the Charter, then they may be achieved via the enactment of a social rights Charter, replete with an administrative machine, for example, the office of a social rights commissioner.

Other than in discrete areas, like French language and aboriginal rights, the Charter is perceived as protecting individual, as distinct from community, rights. The assumptions are: that rights are private -- and fundamental -- to the individuals who have them; and that individuals should largely be unchecked by the State in their enjoyment of those rights. These assumptions are limited to three key respects. First, rights are less particular to the individual than to the community to which she belongs. Second, the nature of rights are determined, less a priori, than according to the quality of their enjoyment. Third, the quality of that enjoyment is contingent upon the social context in which it is exercised.

A socioeconomic charter redressed these three assumptions by stressing the extent to which rights are shared by communities (the community of the poor, the unemployed, the homeless, etc.), rather than vested a priori in one or another individual. The socioeconomic charter aims at identifying the nature of such social rights, the extent to which they warrant specific legal protection (e.g. as minimum rights); and establishes a constitutional process by which to do so.

There are many social and economic rights. These encompass the rights of disadvantaged groups, such as women, racial minorities, disabled persons, and children. They also entertain specific social needs, such as the right to shelter, education, health, employment and income.

As illustrations, a socioeconomic charter might provide for freedom from hunger, for example: "In order to guarantee the right to be free from hunger, the State shall ensure that minimum standards of nutrition are introduced, inter alia, in the pre-school and primary schooling systems, etc." It might provide for a right to a minimum income and welfare right thus: "In order to guarantee a minimum income for all, the State shall provide a scheme of family and employment benefits, including old age pensions". Similarly, it might provide for social welfare, inter alia, through a system of national assurance based on contributions by the State, employers, employees and other interested parties.

Socioeconomic rights may well help Nova Scotia link up with its historic interest in maintaining minimum standards of living in the region. The Atlantic region has much to lose if human rights and notions of basic living standards are compromised in these difficult times in which we live. Most people forget that welfare state and regional development measures were forged in the desperate conditions of the Depression which in the Maritimes lasted from 1919 to 1939 and then threatened to return in the 1950's. The Rowell-Sirois Commission, the Gordon Commission and a whole host of provincial and regionally-focused commissions document the context in which the region, and the poorer groups within it, were accommodated within Confederation. Even the MacDonald Commission declared in 1985 that if transfers disappeared "Canada would eventually find itself with a completely disharmonized tax system in which taxation rates and even definitions of taxable income vary greatly across the provinces." Under such circumstances, the commissioners continued, "the nation could produce a completely disharmonized service-delivery system which lacked any portability of benefits and which made widely different services available from one jurisdiction to the next. In either situation, the principle of horizontal equity as applied to federalism would be eroded: that is, individual Canadians who are identical in every respect except in their province of residence and who should be treated equally by the government sector, would, in fact, be treated quite differently."¹¹

Of course, in practice it may be of little consequence to have minimum standards of services enshrined in the Charter if the will is not there either at the provincial or federal levels to enforce the principle. Nevertheless, as a have-not province, Nova Scotia has a lot at stake on this issue and to have this matter left out of the discourse when constitutional questions are under consideration, would be seen as a serious omission. Section 36 of the Constitution Act, 1982 deals with this matter but it has not been used by us very effectively, if at all. The province should be very clear about how it approaches this topic in any constitutional discussions.

Recommendation # 4: That consideration be given to adopting a socioeconomic Charter. This is of particular concern to Nova Scotians who face the prospect of diminishing transfer payments to support their social services.

References:

- Foster, W. F. and G. Pinheiro, "Constitutional Protection of the Right to an Education" (1988), 11 Dal. L.J. 759-832.
- Hasson, R. "What's Your Favorite Right? The Charter and Income Maintenance Legislation" (1989), 5 J.L. & Soc. Pol. 1-34.
- Jackman, M. "The Protection of Welfare Rights under the Charter" (1988), 20 Ottawa L.R. 257-388.
- McConnell, H. & J. Pyra. "The Impact of Some Aspects of the Constitution and the Canadian Charter of Rights and Freedoms on Education" (1989-1990), 2 Education L. J. 1-48.

¹¹ Royal Commission on the Economic Union and Development Prospects for Canada (U. Toronto Press: Toronto, 1985), Vol. 3, p.231, (hereinafter the MacDonald Commission).

Morrison, I. "Poverty Law and the Charter: The Year in Review" (1990), 6 J.L. & Soc. Pol. 1-29.

Vandycke, R. "La Charte Constitutionnelle et les droits économiques, sociaux et culturels" (1989-1990), 6 Can. Human R. Yearbook 167-183.

III. ENVIRONMENTAL CHARTER

Key Issues:

1. What are environmental rights?
2. Should they be enshrined in the Charter or become part of a parallel Environmental Charter?

During the 1980's, environmental issues have increasingly become the topic of discussion and legislative action. The principle behind the enshrinement of environmental rights in a constitutional document is that Canadian citizens have an inalienable right to live in a safe environment, breathe clean air and drink uncontaminated water. Because we are already living amidst serious levels of contamination of our food, air and water, it is perhaps unrealistic to set the requirement for a clean environment in the Constitution. Nevertheless, various groups including the United Nations, the World Wild Life Fund and some provincial governments (most notably Ontario) have called for a declaration of principle, that puts the environment on the same constitutional level as issues human and equality rights. The Stockholm Declaration of the United Nations (1972), for instance, states, in part, that

"Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and preserve the environment for present and future generations."¹²

This document has become the basis for a plethora of other pieces of international environmental protection legislation, and reflect the intent of world leaders to deal with the problem of environmental degradation.

The World Commission on Environment and Development in its 1987 report entitled Our Common Future maintained that "legal regimes are being rapidly outdistanced by the accelerated pace and expanding scale of impacts on the environmental base of development," and called for legal reform and responsibilities of citizens and the state regarding environmental law and sustainable development.¹³

¹² United Nations Conference on the Human Environment, 11 International Legal Materials, Principle 1, 1416, (Stockholm, 1972).

¹³ World Commission on Environment and Development (Chaired by Gro Harlem Brundtland), Our Common Future (Oxford University Press: Oxford, 1987), 330-332.

It should be noted that aboriginal groups are strong supporters of the idea that governments simply holds land in trust for their citizens. Seen in this way, land, and the broader whole of natural resources, become part of a public trust, which governments can legislate to protect, and which citizens are enjoined to safeguarding. In recent years, aboriginal leaders have also become eloquent advocates of environmental protection. Since the Quebec government has recently declared its interest in maintaining control of environmental issues, it may be less than enthusiastic about moving on this issue at a federal level.

The destruction of the environment emanates from two main sources: i) pollution and ii) overdevelopment. Both large corporations and individual consumers contribute to pollution. The newly enacted Canadian Environmental Protection Act has the mechanisms to abate industrial pollution, and municipalities are passing bylaws to restrict the waste produced by individuals. Measures taken must simultaneously stem the tide of pollution, while strictly regulating growth.

The right to a clean environment has not been formally recognized as an international human right. However, world leaders attending the Earth Summit sponsored by the United Nations Conference on Environment and Development in Brazil in June, 1992 will be asked to sign the Earth Charter, which sets forth a basic statement of environmental and developmental principles and to sign a plan of action called Agenda 21, which provides a blueprint for combating environmental degradation into the 21st century.¹⁴

As myriad scientific studies on the degradation of the environment illustrates, the failure to fulfil the obligation to maintain a clean environment is unquestionably a harm committed to people in that it threatens their very existence. Constitutional rights are held by human beings and are not "human rights", but rather stem from a contract between the citizen and the state. Should the Canadian state be willing to formally recognize its duty to maintain a safe and clean environment, then environmental rights could become a part of our constitutional apparatus. Such rights could either be: 1) added to the present Charter; or, 2) enshrined in a separate Environmental Charter. Since the Quebec government has recently declared its interest in maintaining control of environmental issues, it may be less than enthusiastic about moving on this issue at a federal level.

Recommendation #5: That environmental rights be enshrined in the present Charter or consideration be given to adopting a separate Charter on environmental rights.

References:

- Giogancavo, G. and H. Goldstein, "Law Reform or World Reform: The Problem of Environmental Rights" (1990), 35 McGill L.J. 345-386.
Gibson, N. "The Right to a Clean Environment" (1990), 54 Sask. L.R. 5-17.

¹⁴ Halifax Chronicle Herald, 4 September, 1991.

Hetu, J. "Les recours du citoyen pour la protection de son environnement" (1989), 92 Rev du Notariat 168-203.

Morneau, D. "Pour garantir le droit a un environnement sain" (1990), 2 Maitres 9:47-49

Northey, R. "Federalism and Comprehensive Environmental Reform: Seeing Beyond the Murky Medium" (1991), 29 Osgoode Hall L.J. 127-181.

IV. DISTINCT SOCIETY

Key Issues:

1. Should Quebec be recognized as a distinct society in Canada?
2. Should First Nations people be recognized as a distinct society?
3. What other distinct identities (if any) should be recognized?

In reality, Quebec does form a distinct society within the Canadian whole: it makes good sense to recognize this fact on the constitutional level.

Our view is that the distinct society clause applies only at the level where the limitation of rights is being considered. Some theorists in Quebec would argue that the clause would apply both at the initial interpretive level, and at the limitation level. Essentially, there are three options: 1) the best and most widely acceptable option, as attempted under Meech Lake, to keep the clause as an interpretive tool, 2) the more radical option, which would be to place the distinct society clause in the constitution as a strong guarantee, as some Quebecers would like to see, 3) the weakest and least acceptable option: to place the distinct society clause in the preamble of the Charter.

Some Francophones outside Quebec are concerned about the notion of a Quebec distinct society clause because they feel it will detract from their rights. There are particular concerns about the potential negative impact upon s.23 minority language rights. The Ontario Court of Appeal has interpreted s.23 of the Charter to mean that where numbers warrant, separate school facilities are required for the Francophone minority in Ontario. This same expansive approach for protection of francophone minorities was adopted by the Nova Scotia Supreme Court Appeal Division.¹⁵ The Acadian community in Nova Scotia has a great deal at stake in this issue, and most Acadians are not opposed to the notion of a distinct Quebec society as long as this concept is not interpreted in a manner which weakens the linguistic and cultural rights of Francophones outside Quebec.

¹⁵ Lavoie et al. v. A.G.N.S. (1989), 58 D.L.R. (4th) 293.

The protection of French language rights outside Quebec could be accomplished by modification of the duality provisions in the Meech Lake proposal¹⁶ for distinct society.

In the Meech Lake Accord, Quebec was granted the ability and duty to preserve and promote its unique community, whilst Francophones outside Quebec and Anglophones inside Quebec were granted only the preservation of their rights. The reason for this is that Quebec did not want to find itself in the position of having to promote Anglophones' rights within the French province, or of having to expend money and time on the promotion of French rights outside the province. The Quebec position reflects reality: Quebec is an island of French-speaking persona amidst a vast ocean of Anglophones. The Anglophone minority in Quebec has historically received very favourable treatment -- as late as the 1950's, they held the balance of the wealth and power in Quebec. The position of "the English-speaking community in Quebec continues to be far superior to that of any francophone minority. People do not know that the number of children receiving education in English in Quebec exceeds that of the anglophone school age population in the province. They are also unaware that Quebec's Bill 142 guarantees health and social services in English. With the doubtful exception of officially bilingual New Brunswick, no other province provides such breadth of service."¹⁷

Women's groups across the country expressed concern that a distinct society clause would permit Quebec to ignore or detract from the equality provisions of the Charter. The Federation des Femmes du Quebec, however, was confident that women's rights within the province would not be affected by a distinct society clause; rather, that as part of the francophone majority in the province, the women of Quebec would be helped rather than hindered by a distinct society clause in achieving and maintaining parity with other Canadian women.¹⁸ Theoretically the province of Quebec could use "distinct society" to argue for legislation which infringed equality rights in the Charter.¹⁹ The likelihood of success would be determined by the terms of the distinct society clause.

When added to the Charter, the distinct society clause will apply to all parts of the Constitution, not solely to the Charter. The distinct society clause would not likely be destructive of other Charter rights, as the distinct society clause is an interpretative clause,

¹⁶ 2(1) The Constitution of Canada shall be interpreted in a manner consistent with (a) the recognition that the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada; and (b) the recognition that Quebec constitutes within Canada a distinct society. (2) The role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristics of Canada referred to in paragraph 1(a) is affirmed. (Meech Lake Constitutional Amendment.)

¹⁷ "The Francophone Minority", Karen Taylor-Browne, 185, at 191.

¹⁸ "Are Women's Rights Threatened by the Distinct Society Clause?" Federation de Femmes du Quebec, Brief to the Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord, Minutes of Proceedings and Evidence, No.13 August 26, 1987.

¹⁹ "The Constitution, the Charter and the Distinct Society Clause: Why are Women Being Ignored?", Mary Eberts, Brief to the Ontario Select Committee on Constitutional Reform, 1987 Constitutional Accord

and may not usurp the position of substantive Charter rights.²⁰ Under s.1, the burden is on the government invoking the distinct society clause to demonstrate that the legislative measures in question do not unnecessarily or unfairly infringe other Charter rights. Would the distinct society clause be used directly to subtract from the rights of women, or of Aboriginals? In the unlikely event that this did occur, courts would take the distinct society clause into account only as a factor, not as a determinant in the evaluation of the legislation in question.

One of the concerns expressed by First Nations people about the entrenchment of the distinct society clause in the Meech Lake Accord was the clear insult to the First Nations in not recognizing their distinct identities. In this round of constitutional amendment, there will need to be some recognition of the distinctness of the First Nations in Canada and their contributions to the Canadian fabric. The claims of the Aboriginal peoples, not unlike Quebec, are, in our opinion, unique and do not debate or dilute the Quebec claim to a distinct status.

We are not as positive about other claims to recognizing the distinctiveness of particular provinces or regions in Canada. There are clearly distinctive features about all regions, provinces and territories in Canada, but to give these constitutional recognition would be seen as diluting the claims of Quebec and First Nations as distinct societies. In this round of constitutional amendments, the distinct status of Quebec and the First Nations should be the items on the agenda.

Enshrining distinct society clauses in the Constitution, with respect to Quebec and the First Nations, is in accordance with the entire thrust of this Working Paper; it is consistent with the more collective vision we are proposing, and the move away from deifying individual rights.

References:

Foster, E. "La Charte canadienne des droits et libertes: pour la protection des droits de la personne humaine ou instrument d'evolution de la societe?" (1989), 30 Cahiers de droit 237-255.

Yalden, R. "Liberalism and Canadian Constitutional Law: Tensions in an Evolving Vision of Liberty" (1988), 47 U.T. Fac.L.Rev. 132-155,

Swinton & Rogers, Competing Constitutional Visions (Carswell: Toronto, 1989)

V. LANGUAGE RIGHTS

Key Issues:

1. Are existing constitutional provisions adequate?

²⁰ A. Wayne MacKay, in Swinton & Rogers, Competing Constitutional Visions (Carswell: Toronto, 1989)

2. If not, what changes should be made?

Culture is the main factor which distinguishes Quebec from the rest of Canada, and "language is the natural vehicle for a host of other elements of culture".²¹ In a working paper prepared for the Royal Commission on Bilingualism and Biculturalism, Claude Roman Sheppard points to the life-line between language and cultural survival:

To say that language is a mere means of communication is to state less than half the truth. It is also, and foremost, the foundation of a particular culture, the prerequisite of its survival and the vehicle of its propagation. In this perspective, language can no longer be treated as an incidental: it becomes the essential element of ethnic identity and cultural continuity.

The proclamation of the Constitution Act, 1982, in a bilingual format, produced the fundamental change of enabling courts to look at the equally authoritative French and English versions in interpreting the Charter.²² Linguistic duality became a crucial constitutional standard. Sections 16 to 22 of the Charter entrenched in the Constitution recognition of English and French as the official languages of Canada and the province of New Brunswick. In addition, s.23 gave minority language education rights to Francophone and Anglophone minorities, and is a key factor in the continued existence of Francophones outside Quebec.

"Canadian census figures collected over the past forty-five years show that since World War II the size of the French-speaking population in Canada has decreased relative to both the English-speaking and total populations of Canada. During the same period, the population of Quebec has also diminished relative to the total population of Canada."²³ These facts inform the language policies adopted by the Canadian and Quebec governments. The federal vision, exemplified by the recommendations of the Royal Commission on Bilingualism and Biculturalism, is to have a fully bilingual country. Quebecers, fighting assimilation, have taken a tougher stance in protecting the French language, and have often been characterized as attacking the English-speaking population of Quebec. The federal position has been stalled by resistance from English dominant provinces, and Quebec has focused upon requiring immigrants coming into the province to speak French as their second language.

One of the effects of the Charter has been to circumscribe the Quebec government's language policies: the Supreme Court of Canada used s.23 (which cannot be opted out of) to strike down portions of Bill 101 which limited the rights of Anglophone parents to

²¹ Report on the Royal Commission on Bilingualism and Biculturalism. Vol.1, (Ottawa: Crown Printer, 1967) General Introduction, as xxxix.

²² J. P. McEvoy, "The Charter as a Bilingual Instrument", (1986), 64 *La Revue du Barreau Canadien*, 155.

²³ "The Francophone Minority", Karen Taylor-Browne.

educate their children in English.²⁴ Quebec opted out of another decision where the court invoked the provincial counterpart to s.2(b) to strike down s.58 of Bill 101, which required French only commercial signs.²⁵

In future rounds of constitutional negotiations, Quebec may want to be exempt from s.23 of the Charter, because the province views the issue of language, and particularly its use within Quebec, as a matter for provincial jurisdiction. The Anglophone minority in Quebec has expressed feelings that their rights would disappear without linguistic protection at the federal level, but the government of Quebec has stated that in the province's Charter of Rights or in the Charter of the French language would afford ample language protection for the Anglophone minority.

While stressing that language and its use in Quebec is properly a matter for provincial jurisdiction, the province also argues for greater constitutional protection for the Francophone minority outside Quebec. During the Meech Lake negotiations, Quebec's representatives urged that certain parts of s.23 of the Charter, such as "minority language facilities" or "where numbers warrant" needed to be clarified.

Recommendation #6: Unequivocally, that the distinct society status, as outlined in the recent Federal Proposal, be adopted.

References:

- Green, L. "Are Language Rights Fundamental" (1987), Osgoode Hall L.J. 639-669.
McLellan, A.A. "The Constitutional Politics of Language" (1991), 2 *Constit. Forum* 49-53.
Raume, D. & L. Green. "Education and Linguistic Security in the Charter" (1989), 34 *McGill L.J.* 777-816.
Sneiderman, David. "Language, State & Culture" (1991).

VI. MULTICULTURALISM

Key Issue:

1. Is the current level of constitutional protection of multiculturalism adequate?

The Charter currently provides in s.27 that all the rights in the Charter to be interpreted in a manner consistent with Canada multicultural heritage. This is the extent of the constitutional protection of multiculturalism in Canada.

The current multicultural policy in place in Canada finds its source in federal legislation, the Multiculturalism Act. Multiculturalism is a broad political goal,

²⁴ The Attorney General of Quebec v. Quebec Protestant School Boards, [1984] 2 S.C.R. 66

²⁵ Ford v. A.G. Quebec, [1988] 2 S.C.R. 712.

demonstrating the intent of a government, even though there may be no specific remedies attached to it. In court cases where individuals were prosecuted for promoting hatred of a particular group (e.g. Keegstra, Zundel, Ross), the value of multiculturalism was invoked in conjunction with the notion that persons ought not be persecuted or singled out in any way for reasons of race, ethnicity, religion or economic class.

The protection of multiculturalism has largely been interpreted to the protection of the individual rather than that of hard collective rights; under the idea that diversity is a positive attribute in a society and the rights of individuals to be different beyond the borders of their national state ought to be protected in Canada. Canadians reject the "melting pot" approach taken by the United States, and respect the differences of the various individuals who live here. In sum, multiculturalism is an equitable concept geared to protecting the diversity of Canadian society.

Multiculturalism may, however, be interpreted in the future to protect collective rights. While it does not create any new rights for multicultural groups in Canada, s.27 of the Charter does provide an interpretive standard under which the whole Charter could be used to protect and guarantee the rights of ethnic groups.²⁶

Recommendation # 7: That collective right guarantees of s.27 be affirmed.

References:

Beckton, C.F. "Section 27 and Section 15 of the Charter" (1987), Ottawa, Multiculturalism 1-13.

Gall, G.L. "Multiculturalism and the Fundamental Freedoms: Section 27 and Section 2: (1987) Ottawa, Multiculturalism 29-58.

Gibson, D. "Section 27 of the Charter: More Than A 'Rhetorical Flourish'" (1990), 28 Alberta L.Rev. 589-603

Hudson, M.R. "Multiculturalism, Government Policy and Constitutional Enshrinement - A Comparative Study" (1987), Multiculturalism 59-122.

Magnet, J. E. "Interpreting Multiculturalism" (1987), Multiculturalism 145-153.

VII. EQUALITY RIGHTS

Key Issue:

1. Should the Equality Rights provisions (s.15 of the Canadian Charter of Rights and Freedoms), or the reference of these rights in ss.25, 27 and 28 be changed in any way? More specifically a) should new categories, such as sexual preference, be included in subsection 15(1)? and b) should the affirmative action provisions in subsection 15(2) be modified?

²⁶ "The Meech Lake Accord and Multiculturalism", Anthony Parel, 171, at 172.

Although equality rights are not on the agenda at the present time, they may become an issue as the constitutional debate expands to include the public at large. Much, though certainly not all, of the debate over the Meech Lake Accord revolved around the concerns of groups enumerated in the Charter (aboriginal people, multicultural groups and women) that their interests were being ignored in efforts to accommodate Quebec as a distinct society.

Since the Constitution Act came into effect, there have been differing opinions about the effectiveness of the Charter in protecting minority rights. Nevertheless, enumerated groups (defined according to race, national or ethnic origin, colour, religion, sex, age or mental or physical disability) have not mounted a campaign to be deleted from subsection 15(1); indeed certain groups, such as gays and lesbians, have argued that the sexual preference should be included under the equality provisions of the Charter.

While scholars argue that disadvantaged groups not listed in s.15 may succeed in claiming equal rights under this section, enumerated groups receive specific protection of their human rights. The enumerated grounds thus have a stronger basis for their claims. Even among the enumerated grounds of s.15, however, there appears to be a hierarchy of rights. Only aboriginal peoples, ethnic minorities and women receive human rights protection from Charter ss.25, 27 and 28 -- sections which, unlike s.15, are exempt from the possibility of provincial government override under s.33.²⁷

In 1980, the Canadian Association of Lesbians and Gay Men requested the parliamentary Committee on the Constitution that sexual orientation be included in s.15, and although it is not, a consensus has emerged that sexual preference is an analogous ground of discrimination prohibited by s.15. Particularly in the area of family law, heterosexual couples are supported by a wide array of legal privileges, benefits, rights and powers that are denied to gay and lesbian couples. By expanding the equality rights of s.15(1) to include sexual preference, such discrimination would have less basis in law.

There is more scope for affirmative action under s.15(2) than is usually conceded. People often equate this section with its narrower counterpart in the United States. It is unlikely that there will be an attempt to change this provision, nor any grounds well of support for doing so.

Ultimately, most enumerated grounds under s.15(1) are well organized and vocal in protecting their claims under the Charter. They will expect their provincial government to take a strong stand in seeing that the positions already established are not eroded in any future constitutional negotiations.

Recommendation #8: That the enumerated grounds in s.15(1) be reconsidered and expanded to include other categories such as "sexual orientation".

²⁷ "The Meech Lake Accord: Entrenching a Pecking Order of Minority Rights", Evelyn Kallen, XIV Canadian Public Policy (1988) S107, at S114.

References:

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VIII. NOTWITHSTANDING CLAUSE

Key Issue:

1. Should s.33 (notwithstanding clause) be retained or not?

The introduction of the notwithstanding clause was a *sine quo non* to provincial agreement during the 1982 round of constitutional amendment. The desire to have such a clause was particularly important to the western provinces but other provinces were also favourable to such a reassertion of Parliamentary sovereignty. The federal government reluctantly accepted s.33 on the assumption that its use would generally be bad politics. To date, there have only been three uses of the override clause. In Saskatchewan, the clause was inserted in back-to-work legislation on the possibility that the Charter would be interpreted to include the right to strike.²⁸ Rene Levesque's Parti Quebecois Government put an override clause into all their legislation as a political protest against the Charter. Finally, Premier Bourassa of Quebec used the override clause to circumvent the ruling of the Supreme Court of Canada on the use of bilingual signs in Quebec.²⁹ It is this last use that has sparked debate about the role of s.33 in the Charter.

²⁸ Since this time, the Supreme Court of Canada has interpreted freedom of association as not including the right to strike.

²⁹ Ford v. A.G. Quebec, [1988] 2 S.C.R. 712.

Peter Russell has called the legislative override "that quintessential Canadian compromise".³⁰ Russell argues that by enabling a legislature to overturn a judicial decision, the notwithstanding clause prevents the resolution of complex social issues such as Sunday closing and abortion by contest between legal opponents as opposed to by a political process which is more likely to yield a social consensus. Different issues of social policy, he contends, may still be decided via the process of parliamentary government.³¹

Section 33 is in reality the route for the revival of parliamentary democracy in Canada, a way to steer the country away from the trend towards Americanization of our constitutional process and the exaltation of the individual. The section could be used to "reassert the popular will against judges who attempt to frustrate that will".³² The Supreme Court of Canada has affirmed the principle of legislative supremacy in recent decisions. "The Court seems to be going out of its way to emphasize that the Quebec National Assembly can, by invoking s.33, insist on French-only signs if it wishes, with the proviso that this decision is one for which the politicians, not the judges, will have to accept full responsibility."³³

Realistically speaking, the notwithstanding clause is here to stay -- the West and Quebec both want it, and it would be a strategic mistake in political negotiations, if the clause were rejected once again.

Recommendation #9: That s.33 be modified as per the Federal Proposal or maintained in the Constitution as is.

Reference:

Whyte, J. D. "On Not Standing for Notwithstanding" (1990), 28 Alberta L.Rev. 347-357.

³⁰ Peter H. Russell, "The Effect of a Charter of Rights on the Policy Making Role of Canadian Courts", Canadian Public Administration. XXV:2 (Spring, 1982) p.32.

³¹ Ibid.

³² Robert Martin, "The Charter and Crisis in Canada", in After Meech Lake: Constitutional Reform: Charter of Rights and Freedoms" (U. Western Ontario), 121, at 134. Martin describes instances involving federal and provincial legislation which clearly had public support, yet which was overturned by one or two judges, with the use of the Charter.

³³ A. Wayne MacKay and Dianne Pothier "Developments in Constitutional Law: The 1988-1989 Term" (1990), Supreme Court L.R. 81, at 173.

**REPORT OF THE ADVISORY COMMITTEE
ON THE DIVISION OF POWERS
AND GOVERNMENT INSTITUTIONS**

**REPORT OF THE ADVISORY COMMITTEE
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AND GOVERNMENT INSTITUTIONS
INTRODUCTION**

The Advisory Committee on the Division of Powers and Government Institutions was established by the Division of Intergovernmental Affairs of the Province of Nova Scotia. The committee was asked to consider the Province's constitutional position on two subjects: the distribution of legislative powers between Parliament and the provincial legislative assemblies; and national government institutions. Accordingly, this report addresses each of these in turn.

The committee undertook its work before the federal government released its constitutional paper, "Shaping Canada's Future Together," September 1991. There are only a few references to the federal document in the report, and they are all found in the first part on the division of powers. However, the analysis contained in the report, governed as it is by the committee's view of Nova Scotia's constitutional interests, is applicable to the federal proposal, and therefore should serve as a useful tool in assessing it.

EXECUTIVE SUMMARY

Part I: Distribution of Powers

The committee recommends the following:

- (1) The Atlantic Provinces should be unified at the negotiating table.
- (2) Nova Scotia should adopt limited, clear and politically saleable priorities.
- (3) Nova Scotia should propose an asymmetrical or "distinct" status for Quebec, achieved through interdelegation (if this is possible) or, if this is not acceptable to Quebec, through concurrent provincial/federal jurisdiction with provincial paramountcy. This would only apply to those fields of jurisdiction which are not essential for maintaining a national identity in the long term, or would be subject to federal paramountcy in the definition of national standards in those essential fields.
- (4) Nova Scotia should oppose any restriction on the principle of redress of regional economic disparities or equalization payments.
- (5) Nova Scotia should oppose any restriction on the federal spending power insofar as it would affect Nova Scotia or any province which wishes to maintain federal spending power. This includes limitations on federal spending power in the areas (mining, forestry, tourism, manpower training, urban/municipal matters, housing, recreation), which the federal government has proposed to transfer to exclusive, provincial jurisdiction. If Quebec wishes to limit federal spending power in Quebec, then this should be achieved by permitting provinces to opt out of national spending

programs, with compensation subject to federal "national objectives". The compensation should be cash, not tax points.

- (6) Nova Scotia should demand that Canada become a full, effective, national economic union. The Constitution should provide that all federal or provincial governmental or statutory economic barriers to the free-flow of goods, services, labour and capital be invalid. Regional development measures and equalization would be excepted. Barriers to the economic union would require approval after open debate by an Upper House having weighted representation from the smaller provinces.
- (7) Nova Scotia should insist on maintaining exclusive federal jurisdiction over the offshore fishery.
- (8) Nova Scotia should ensure that the federal proposal to abandon the "declaratory power" does not prejudice federal operation or spending for Devco.
- (9) Any concurrent federal/provincial jurisdiction over transportation, communications or trade and commerce, manpower training and economic development should be expressly subject to federal paramountcy as essential to the economic union. Any transfer of presently federal exclusive power to concurrent federal/provincial powers should maintain federal paramountcy in fields essential to the economic union. This principle should guide Nova Scotia's response to any proposal for transfer to the provinces of federal powers necessary to regulate an economic union.
- (10) The Constitution should contain a Charter of Social Rights -- a commitment directly to individuals that they are entitled to certain minimum standards of well-being for health, education and social services. The Charter should not be legally enforceable.
- (11) Nova Scotia should oppose the entrenchment of "property rights" in the Constitution.

Part II: Government Institutions

Senate Reform

The paper on Senate reform analyses three reform models: the Triple-E Senate; the Australian Senate; the German Senate. In analysing them, it tries to figure out how each would work within the context of Canadian government and politics. The paper concludes with a section on the "best" reform model for Nova Scotia, that is, the best possible option given some well known political constraints. This model possesses these features:

- (1) an electoral system of proportional representation;
- (2) weighted representation of the provinces;
- (3) the power to review and vote on all government bills;
- (4) special powers that the Commons does not possess, such as a ratification power over appointments to specified government agencies;

- (5) a modified veto power, possibly a suspensive veto, in relation to tax and appropriations bills.

Council of the Federation

The paper on the Council of the Federation analyses the two proposals for a non-parliamentary Council available prior to the release of the recent federal proposal, Shaping Canada's Future Together. It emphasizes the importance for a small province like Nova Scotia of the decision-making rule that is adopted for such a body.

PART I: DISTRIBUTION OF POWERS

1. Preliminary

We make two tactical points.

The Atlantic Provinces if possible should be unified at the negotiating table. Quebec and Ontario each speak for one-quarter of the country. The west usually speaks in unison on important issues. Unless the four Atlantic Provinces speak together, we will be steamrolled. This does not require political union -- just a common and disciplined negotiating position. Neither does this suggest that Nova Scotia compromise its vital interests to achieve commonality. Rather, the Atlantic Provinces should recognize that their vital interests are substantially common.

Nova Scotia should adopt limited, clear and politically saleable priorities. Our bargaining power is limited. We will do better with a few focused goals than an ad hoc shopping list.

2. Political Priorities

What are Nova Scotia's political priorities?

Nova Scotia's first priority is to maintain Canadian unity. Quebec's "demands" have crystallized the crisis. A constitutional consensus in the rest of Canada which is unacceptable to Quebec may result in Quebec's declaration of independence. It is in our interest to keep Quebec in Canada. Nova Scotia should consider Quebec's demands, and what practical solutions are available. Quebec's proposals are not inviolate just because they are "demanded". This is a negotiating process. Positions are fluid, whether the proponents admit it or not. Conversely there is no doubt a threshold beyond which Quebec will declare independence, a result Nova Scotia wishes to avoid.

Quebec is not the only player. There are serious proposals for substantial constitutional change from other provinces, the federal government and native groups.

Nova Scotia should consider how the "changed" Canada which will result from these proposals by Quebec and the other provinces will affect Nova Scotia's vital interests, and what measures are available to protect or enhance those interests.

Nova Scotia should consider how this process may be used to Canada's advantage, *i.e.*, how may we modernize the anachronisms in the 1867 distribution of powers to: (a) better position ourselves in the modern global economy, and (b) create a "national glue", a reason to go on together as a country.

These are Nova Scotia's broad priorities, and the focus of this part of the paper. The position of our native peoples is being considered by a separate committee.

3. Nova Scotia's Reply to Quebec

There are five possible arrangements between Quebec and the rest of Canada.

First is an independent Quebec. This is potentially disastrous for Nova Scotia and everyone else.

The split could be bitter.

The rest of Canada might wish to carve off portions of Quebec's territory. Quebec has designs on Labrador.

Quebec and Canada might not agree on Quebec's share of the national debt. The Belanger-Campeau proposal to split the debt ignores the past redistribution of wealth from the rest of Canada into Quebec. Internationally, Canada would be responsible for the full national debt, with Quebec making payments to Canada. Suppose Quebec declared independence and refused to pay.

For a monetary/fiscal/economic "association" to be effective, each side would need some control. The rest of Canada would balk at any political control by an independent Quebec in Parliament over the levers of Canada's fiscal policy.

We do not suggest that economic association would be impossible. An economic arrangement would likely coalesce in the long term after any split. But the short term context would be divisive.

Negotiations for an economic "association" would unwind relations between other provinces developed over decades by incremental adjustments to economic, fiscal and tariff policies. For instance, the west might wish to re-examine the Autopact and other industrial incentives to Central Canada. Ontario would bristle at this.

Ontario would have about 50 percent of the population of Canada without Quebec. Other provinces might see this as disproportionate. They might wish to split Ontario into several provinces, or diminish Ontario's political power with a "Triple-E Senate". Ontario would disagree.

There might be a flight of capital from Canada, or from some provinces to others.

A Canada/Quebec split could unravel the political and economic fabric between the remaining provinces. Crisis focuses self interest. The rest of Canada might become unglued. This would be the worst possible scenario for Nova Scotia.

The federal government contributes approximately \$9 billion net to Atlantic Canada each year -- approximately \$3,900 for each Nova Scotian. 39.4 percent of the money which the Nova Scotia government has to spend each year comes from the federal government. This includes equalization payments (\$970 million), transfers under the Established Program Funding (EPF) for health care and post-secondary education (\$331 million), transfers under the Canada Assistance Plan (CAP) to finance social welfare payments by the province (\$304 million). This includes regional development funding (eg. ACOA). In addition, are direct payments by the federal government to individuals such as unemployment insurance, of which Nova Scotia obtained 145.6 percent of the national average in 1989.

This is what we stand to lose financially if the country dissolves.

An independent Quebec is the worst option for Nova Scotia.

Second is a strong federal government (with centralized legislative and spending powers), in a symmetrical constitution (the ten provinces having equal powers). This is the vision of Mr. Trudeau and Mr. Wells. It is what many perceive to be the status quo.

This is not a real option. It is unacceptable to Quebec. If the rest of Canada insists on this, Quebec will declare independence. This is clear from what appears to be the inexorable political momentum in Quebec.

Third is a severely decentralized but symmetrical constitution. The federal government would relinquish to all provinces much of the federal legislative and spending powers. All provinces would be the same. None would be "special" or "distinct".

This option also has potentially disastrous consequences for Nova Scotia.

The Belanger-Campeau Report to the Quebec National Assembly recommends that Parliament retain exclusive authority only over defence and territorial security, customs and tariffs, currency and the common debt, and equalization. Parliament would retain concurrent authority over native affairs, taxation and revenue, immigration, financial institutions, justice, fisheries, foreign policy, post office and telecommunications, and transportation. All other matters would be within exclusive provincial jurisdiction, including social affairs, municipal affairs, agriculture, unemployment insurance, communications, culture, regional development, education, energy, environment, housing, industry and commerce, language, recreation and sports, manpower, family policy, research and development, natural resources, health, public security, income security and tourism. Belanger-Campeau would eliminate the federal spending power in areas of exclusive provincial jurisdiction -- i.e. no more federal spending for municipal affairs, agriculture, employment insurance, communications, education, health, manpower, research and development, housing, etc.

Assume a country where the federal government had no legislative or spending powers in these areas. Where would Nova Scotia obtain the money to fund all the programs which the federal government now operates in these areas? The only possible source is greater equalization transfers from Ottawa. Ottawa would have to tax the "have" provinces for the money to pay Nova Scotia.

The national government would become a mere teller's wicket. Canada's reason for living would be to transfer money. There would be no inspirational national symbol to hold us together. Residents of Ontario, British Columbia and Alberta would think of "Canada" as just a tax collector. They would soon disengage from this sterile arrangement.

A country in which every province exercises the powers which Quebec proposes for itself would disintegrate.

If Canada disintegrates Nova Scotia's standard of living will collapse.

Fourth is minimal decentralization in a symmetrical constitution. Parliament would relinquish to all provinces certain powers, but retain most of the powers which Quebec now demands. For instance, a constitutional amendment which merely assigned to the Provinces exclusive jurisdiction over "intraprovincial culture" (leaving Parliament with power to promote national culture) would be minimal decentralization. For such an arrangement to be satisfactory to Nova Scotia it would be essential that the federal government retain its full spending powers, and whatever legislative power Parliament now exercises over certain areas which are critical to Nova Scotia's interests. These would include any legislative powers dealing with redistribution of wealth and economic union. An acceptable "minimal symmetrical decentralization" to Nova Scotia would differ markedly from the proposals in the Allaire and Belanger-Campeau reports. It is difficult to envisage a compromise.

Fifth is constitutional asymmetry, or an arrangement which permits Quebec to have powers which the other provinces could but might not choose to exercise. An example is a substantive (not merely symbolic) constitutional recognition of Quebec's "distinct society". This is the federal approach ("Shaping Canada's Future Together" September, 1991). Or this could be concurrent jurisdiction with provincial paramountcy. It could involve interdelegation (Parliament delegating its powers to Provincial Legislatures or tribunals or vice versa). This could be a federal statutory regime with administration delegated to the province. There are various mechanisms to achieve the result.

"Distinct" is a loaded word. The federal proposal that the Constitution declare Quebec substantively "distinct" may evoke suspicion from other Canadians who consider themselves "distinct" as well. Our present situation is largely the result of the antipathy of English Canada to even the mild asymmetry of The Meech Lake Accord.

We make two points on "distinctness". First, Quebec's bottom line (the threshold beyond which Quebec will separate) probably requires that Quebec be permitted to exercise powers which some other provinces do not wish for themselves. We have to face this reality. Canada has to choose the lesser of two evils. Second, there are different kinds of

"distinctness", some less inflammatory than others. It may be possible to permit Quebec to exercise powers, which Parliament exercises elsewhere in Canada, while minimizing the constitutional recognition of Quebec as "distinct".

There is nothing anomalous about constitutional special status. The ten provinces entered Confederation at different times. The constitutional statutes of all the provinces have protected special interests. The original British North America Act, and the later constitutional statutes contain guarantees recognizing special status of each province on different matters. Atlantic Canada has more Senate seats per capita than other provinces. It is a myth that "all provinces are created equal under the constitution".

There are agreements between the federal government and Quebec which give Quebec special or delegated powers. Immigration is one example. Nova Scotia and Newfoundland have arrangements with the federal government giving those provinces influence over offshore resources. Regional development programs and transfer payments benefit "have not" provinces at the expense of "have" provinces. Quebec has opted out of federal cost sharing programs and the Canada Pension Plan. Certain provinces have opted out of federal corporate or individual tax collection procedures. Provinces have agreements with the federal government on various matters in federal jurisdiction. The "double aspect" doctrine of constitutional interpretation permits a province to enact legislation respecting a "matter" which for federal purposes lies within exclusive jurisdiction of Parliament.

We do not have a "symmetrical" confederation now. Our federation is significantly customized to the distinct needs of different provinces.

"Distinct" status for Quebec can be achieved by flexible devices which, on their face, treat all provinces equally. We now have federal paramountcy where legislation of Parliament and a provincial legislature conflict. The Constitution could provide for concurrent federal and provincial jurisdiction, with provincial paramountcy. We now have concurrency with provincial paramountcy over pensions in Section 94A of the Constitution Act, 1867, which permits Quebec to replace the Canada Pension Plan with the Quebec Pension Plan. With concurrency and provincial paramountcy, a province could enact legislation which ousts federal jurisdiction and replaces the federal with the provincial scheme. Absent such provincial legislation, the federal legislation would prevail. This would permit Quebec to exercise jurisdiction over areas where the federal government would exercise jurisdiction in Nova Scotia. Under the Constitution Act, Nova Scotia and Quebec would be equal; each would have concurrent jurisdiction with Parliament, subject to provincial paramountcy. Quebec's "distinct" status would be achieved through provincial legislation, which Nova Scotia presumably would not enact. Quebec's "distinctiveness" would be statutory instead of explicitly constitutional. This might make the concept of "distinct" status more palatable to purists who want constitutional symmetry.

There are methods of achieving "distinct" status for Quebec which are even less intrusive than concurrency with provincial paramountcy. For instance, Parliament could by statute delegate powers to the Legislature of Quebec. Pure interdelegation in this manner is not permitted under present constitutional jurisprudence. It would be necessary to amend the Constitution to permit it. It is highly unlikely that this form of

interdelegation would be acceptable to Quebec, given the sort of demands it is making now.

If interdelegation is not "in the cards", then concurrency with provincial paramountcy is the next best option to minimize the damage to Canada's present constitutional structure. Even concurrency with provincial paramountcy should not be taken too far. If the principle applied to virtually every federal power, then each province could opt out of national standards on almost everything. Quebec would probably do so. Other provinces would probably do so to different degrees. This checkerboarding would accelerate the momentum to national dissolution.

Concurrency with provincial paramountcy should target only those areas where provincial jurisdiction is either more efficient or essential to preservation of Quebec's identity. Nova Scotia and Canada should not simply accept Allaire's list or Belanger-Campeau's list. Concurrency with provincial paramountcy can apply to a broad spectrum of (presently) federal powers. However, Parliament should then possess paramount power to define national standards in areas basic to national identity (eg. communications) and provincial paramountcy would apply to the specifics. One such area where Parliament must be paramount is interprovincial trade and commerce which is basic to the economic union (discussed below).

In summary, the ideal for Nova Scotia is a minimal but symmetrical decentralization (the "Fourth" option above). But such a compromise is probably not feasible given the polarities in Quebec and among the federal purists.

The next position for Nova Scotia is an asymmetrical or "distinct" status for Quebec, achieved through interdelegation (if this is possible) or, if this is not acceptable to Quebec, through concurrent provincial/federal jurisdiction with provincial paramountcy. This would only apply to those fields of jurisdiction which are not essential for maintaining a national identity in the long term, or would be subject to federal paramountcy in the definition of national standards in those essential fields.

4. Nova Scotia's Economic Priorities

What are Nova Scotia's economic priorities?

First, Nova Scotia should insist that Canada maintain financial redress of fiscal disparities, i.e. "equalization" payments. Second, Nova Scotia should insist on undiminished federal spending power respecting regional and personal disparities. Third, Nova Scotia should insist on structural redress of the economic disparities, with the goal of achieving economic self-sufficiency.

It is necessary at the outset to distinguish between equalization and redress of economic disparity through the federal spending power. **Equalization payments** "equalize" the fiscal capacity of provincial governments. "Equalization payments" are not directed at other disparities such as inequality in income, unemployment, consumer prices or business costs.

The federal **spending power**, on the other hand, involves five forms of payment. First there are transfers from the federal government to the provinces to help fund programs operated by the provinces (eg., EPF and CAP payments). Second, there are payments by the federal government to businesses to promote economic development (eg. ACOA). Third, there are payments by the federal government directly to individuals in areas of federal legislative jurisdiction (eg. unemployment insurance). Fourth, there is financial assistance by the federal government to individuals in areas of provincial legislative jurisdiction (eg. housing, manpower retraining). Fifth, the federal government spends money on operations which may lie within provincial legislative jurisdiction (eg. forestry, mining, tourism, recreation). Together these constitute the "federal spending power", which is distinct from "equalization".

The importance to Nova Scotia of both "equalization" and the federal spending power cannot be overemphasized. They mean billions of dollars annually -- the lifeblood of our well-being.

Redress of regional economic and fiscal disparities is not a lame, cup-rattling commitment to economic mediocrity. The principle is based on equity. Every Canadian has the right to minimum standards of well-being. This is inherent in "Canadianism". It is a commitment stated in Section 36 of the Constitution Act 1982. It is a principle which sets Canada apart from other countries. Every country needs basic principles and symbols to bind it.

It is fundamentally mistaken to assume that "equalization payments" are economically inefficient. Equalization payments "equalize" the fiscal capacity of provincial governments to pay for provincial programs, including provincial public services to individuals. Without equalization payments Nova Scotia could not afford medicare. Without medicare, individuals would migrate from Nova Scotia to Ontario so they and their families could enjoy free medical service. Many of these individuals may have talents which they could use more productively or efficiently in Nova Scotia. This form of induced migration is inimical to efficient productivity. It occurs because of economically artificial (i.e. government-created) inducements, and does not promote the efficient allocation of economic resources. We should not be defensive in our claim to undiminished equalization payments.

In remedial terms, Nova Scotia has every right to insist on financial and structural redress of fiscal and economic disparities.

Atlantic Canada has paid into a system which has subsidized Central Canada for years. Central Canada has become the manufacturing and industrial engine of Canada through a deliberate policy of the federal government. Atlantic Canadians have paid tens of millions of dollars more for automobiles manufactured in Ontario than they would have paid for foreign vehicles. Canadian tariff policies have protected Ontario vehicles to promote manufacturing in Ontario. There are many other examples. This national industrial plan has concentrated population and infrastructure in Central Canada to the point that Central Canada's competitive advantage now is self-generating. Nova Scotia's lost opportunities for industrial development are difficult to calculate. But the "opportunity

cost" is probably more substantial than the direct payments to Central Canadian industries. We have paid the price.

The recent Ontario budget catalyses the need for redress. Ontario will incur an approximate \$30-35 billion deficit over four years, primarily to promote social welfare in Ontario. The deficit will diminish Ontario's power to be Canada's paymaster. A cleavage will develop between the ideal and the possible. Ottawa may no longer be able to deliver on its commitment to maintain minimum standards of well-being.

The cleavage is apparent in the last two federal budgets, which have capped EPF transfers per capita and placed a growth ceiling on CAP payments to "have" provinces.

Section 36 of the Constitution Act guarantees equalization payments sufficient to ensure that each province has "reasonably comparable levels of public services at reasonably comparable levels of taxation". Federal austerity has stretched this standard taut, especially for health care and education and municipal funding. Section 36 may be merely a "political" commitment and legally unenforceable.

Nova Scotia should resist any attempt to limit the concept of s. 36, i.e. comparable standards of well-being among individuals. For instance, if redress of economic disparities was restricted to mere business development (as some have proposed), personal standards of living in Nova Scotia would fall. This itself would discourage business people coming to Nova Scotia.

Nova Scotia should oppose any restriction on the principle of redress of regional economic disparities or equalization payments.

"Equalization" payments are only part of the redress of regional economic disparity. The federal spending power is the other. The federal government taxes income (higher in the wealthier provinces) and spends per capita; a significant redistribution of wealth.

Without the federal spending power Nova Scotia could not afford medicare, hospital insurance and much of our higher education, municipal funding and social welfare programs.

Many proposals for constitutional reform over the last several decades would limit federal spending power. Quebec has long proposed this. The Belanger-Campeau report proposes that the federal government have **no** spending power in areas of exclusive provincial jurisdiction. These areas, according to Belanger-Campeau, would include social affairs, municipal affairs, agriculture, unemployment insurance, communications, regional development, education, energy, the environment, housing, manpower, research and development, health and natural resources. The impact on Nova Scotia of such restrictions would be calamitous. The federal government has proposed transferring to exclusive provincial jurisdiction areas where Provinces already have legislative jurisdiction, and existing federal programs derive primarily from the spending power, not legislative powers (mining, forestry, tourism, manpower training, urban/municipal affairs, housing, recreation). This may be a Trojan Horse. Where is Nova Scotia to obtain the funds to

replace the federal programs? What appears on the face of the federal proposal as a surrender of power may really be a transfer of spending responsibility without a corresponding transfer of revenue capacity.

Nova Scotia should oppose any restriction on the federal spending power insofar as it would affect Nova Scotia or any other province which wishes to maintain federal spending power. This includes restrictions on federal spending power in the areas (mining, forestry, tourism, manpower training, urban/municipal matters, recreation) which the federal government has proposed to transfer to exclusive provincial jurisdiction. If Quebec wishes to limit federal spending power in Quebec, then this should be achieved by permitting provinces to opt out of national spending programs, with compensation subject to federal "national objectives".

The Meech Lake Accord stated that the compensation be spent compatibly with "national objectives". Quebec could enact legislation which ousts federal jurisdiction to spend in Quebec but leaves untouched federal powers to spend in other provinces. Even this solution has dangers for Nova Scotia. If provinces can opt out and take federal compensation, the federal government will have little political incentive to propose new national spending programs. Why should federal politicians take the heat from taxation without the accolades for spending directly to Canadians? Over time this may reduce the effective distribution of wealth to Nova Scotia. Nonetheless, the Meech Lake formula is probably the minimum Quebec will accept, and Nova Scotia has already agreed to it.

Nova Scotia should be wary of the definition of this "compensation" for provinces which opt out. **The compensation should be cash, not tax points.** A tax point is worth more in Ontario than in Nova Scotia. Tax point compensation would encourage wealthy provinces to opt out and would reverse the "equalization" system.

The discussion above considered the financial redress of regional economic disparity. The next point is the structural redress.

5. Structural Priorities

Atlantic Canada's long-term focus should be to redress the structural imbalance. This differs in principle from a short-term goal of maximizing equalization payments in the next fiscal period.

Is structural redress possible? The answer is yes, to a degree, but only over the long term.

The original reason for central Canadian economic dominance was federal policy supported by political power located in Ontario and Quebec. A reformed Upper House giving politically legitimate (i.e. elected or representative) power to the regions will dilute Central Canada's political power. A key function of any revised Upper House would be to guard an economic union; to liberate competitive advantage outside Central Canada.

The existing economic infrastructure promotes "margin to centre" trade in Canada, with resources at the margin and manufacturing in Central Canada. Central Canada is the departure point for north-south trade. This is inconsistent with the Free Trade Agreement, permitting north-south access across the country. It is inconsistent with the global move to efficiency and economic union inside large trading blocks, such as the European Community.

Nova Scotia should demand that Canada become a full, effective, national economic union. The constitution should provide that all federal or provincial governmental or statutory barriers to the free-flow of goods, services, labour and capital be invalid. Regional development measures and equalization would be excepted. Barriers to the economic union would require approval after open debate by an Upper House, having weighted representation from the smaller provinces.

It is remarkable that the European Community will soon have a fuller economic union than Canada. With the Free Trade Agreement there are instances of freer movement between Canada and the United States than between some provinces. Full economic union will promote efficient capital formation. Businesses or industries for which Nova Scotia has competitive advantage would form naturally as a result of individual initiative. Inefficient businesses would not be forced by bureaucratic direction. No longer would we waste tax dollars and create deficits propping up industries which fail anyway after the funding dries up. The other side of the coin is that Nova Scotia would no longer lose industries and businesses for which Nova Scotia has competitive advantage as a result of national economic policy to promote manufacturing in Central Canada. We have no illusions of attracting many head offices from Toronto, but at least business with reason to be in Nova Scotia would not face artificial barriers. Nova Scotia has natural advantages: an ocean coast, proximity to the American population centres, and environment and quality of life which may be envied by commuting metropolitans. We have academic and research facilities proportionately higher than any other province. We have not used these to optimize our commercial advantages. With modern global communications and a service-oriented economy, it will become more feasible to locate businesses outside Toronto.

A full economic union would make Canada more efficient within the North American Free Trade zone and globally.

Much of Canada's political and constitutional dissatisfaction is the result of a basic fact. In many respects our economy doesn't work. We have bureaucratic duplication and galloping deficits. We are unable structurally to redress regional economic disparities. We waste tax money on inefficient ventures for short-term political reasons. Everyone knows examples of government inefficiency. Yet politicians with the best intentions cannot stop it.

A true economic union promotes individual initiative to determine capital formation. This is the way it should be. Capital does not crystallize efficiently in the mind of a civil servant. Government should liberate our resources by getting out of the way. Getting out of the way is easy once we get used to it.

Over the long term, a full national economic union is the route to whatever structural redress is feasible. There is no short route.

This is consistent with portions of the Allaire Report, which affirms the need for strong Canadian economic union. The Allaire Report would achieve this by federal-provincial agreements. In our view, something stronger is required than a commitment to "agree".

The recent federal proposals for an economic union require detailed analysis. The federal proposal has three aspects. First is the pure economic union -- the free movement of goods, services, capital and labour, and the disappearance of barriers to that movement. The federal proposal permits exceptions in the national interest, and states that measures to promote regional development or equalization would also be excepted. This is consistent with our recommendations above.

The second and third aspects of the federal proposal for an economic union are more controversial.

- (a) The second aspect is that Parliament be given a new power to make laws for the efficient functioning of the economic union. Because the managing of the economic union is an area of shared responsibility, the federal proposal states that the power cannot be enacted without the approval of at least seven provinces representing 50 percent of the population. A province which did not support the proposal could opt out for at least three years.
- (b) The third aspect is that federal and provincial fiscal and monetary policies be "harmonized" according to guidelines which would require approval of at least seven of the provinces representing 50 percent of the population, and three provinces could opt out.

Our concern is with the undefined breadth of these proposed new federal powers. In particular, we raise three points. First, the new federal power to legislate "for the efficient functioning of the economic union" could include almost anything. For instance, national standards on education are basic to full labour mobility. Is it contemplated that Parliament have legislative power over education? Manpower training is certainly an area which is basic to labour mobility and an efficient economic union. Yet the federal government proposes elsewhere in its paper that manpower training be exclusively provincial. The ramifications of the new federal powers should be considered expressly before any amendment is made to the Constitution. If the federal legislative power concerning the efficient functioning of the economic union is interpreted as broadly as it is worded, then federal activity will inevitably collide with provincial policies, with all the political divisions which follow any federal veto of provincial initiatives. Forced "harmonization" of provincial fiscal policies with a central fiscal policy might exacerbate these political confrontations.

Second, the potential takeover of provincial powers might render the proposal unacceptable to key provinces in the upcoming constitutional negotiations (eg. Ontario and

Quebec who have already expressed reservations). This would make the federal proposal an unrealistic nonstarter and derail the other aspects of the proposed economic union.

Third, federal power to legislate concerning the "efficient functioning of an economic union" might create a new federal "administrative" bureaucracy. Basic to an economic union is **absence** of government barriers, as stated in the preface to the federal proposal:

"At the heart of an efficient economic union is the free flow of people, goods, services and capital. This requires an absence of internal barriers."

A new federal bureaucracy which would administer an economic union is inconsistent with the concept of "absence of barriers". Government tends to create its own barriers.

With respect to the second and third aspects of the federal proposal, we recommend the following. **First**, there should be a better definition of the scope of federal legislative power "for the efficient functioning of the economic union" to ensure there is no unintended shifting of provincial powers to the federal government. **Second**, the federal power to legislate respecting the economic union should be expressly subject to the principle that an economic union means **absence** of barriers -- *i.e.* the federal legislative power should not permit the erection of a new government bureaucracy which itself creates barriers to private decision making. **Third**, if the second and third aspects of the federal proposal for the economic union (federal legislative power and "harmonization" of fiscal policies) are simply not acceptable to key provinces in the constitutional debate, then they should be dropped. The most important part of the economic union is the first aspect of the federal proposal -- a constitutional guarantee that goods, services, labour and capital move freely within Canada without barriers.

The next point is to consider the various proposals for transfer of specific powers between levels of government. This paper will not consider every proposal, only those which directly affect Nova Scotia's vital interests.

Once such area is the offshore fishery. **Nova Scotia should insist on maintaining the status quo: federal exclusive jurisdiction over the offshore fishery.** Nova Scotia should oppose any provincial jurisdiction over the offshore fishery which, for example, would permit one province to exclude fishermen from another province.

The federal government has proposed that Parliament abandon its "declaratory" power. Section 92(10)(c) of the Constitution Act 1867 permits Parliament to exercise jurisdiction over "works" which Parliament declares "to be for the general advantage of Canada for the advantage of two or more of the provinces". Nova Scotia should be aware that the Cape Breton Development Corporation Act of Canada R.S.C. 1985 C-25, Section 35 states that the works and undertakings of the Cape Breton Development Corporation are "declared to be works for the general advantage of Canada" under Section 92(10)(c). This is where Parliament derives its jurisdiction to operate Devco. It is unclear how the federal government proposes to operate Devco after abandoning its "declaratory power".

Nova Scotia should ensure that any abandonment of the "declaratory power" does not prejudicially affect federal operations or spending for Devco.

Nova Scotia should oppose any transfer of federal powers to provinces which would permit significant interference with the operation of an effective economic union. Transportation and communication are examples. Communications are especially important to the technological infrastructure of the future global economy. Interprovincial transportation (eg. a national highway system) is basic to a functioning economic union and regional development. Provincial highways which connect at provincial borders do not necessarily create the most efficient system for interprovincial trade. Any transfer of federal jurisdiction over trade and commerce or economic development should not inhibit the economic union. The federal government has proposed that manpower training be exclusively provincial. This is inimical to an effective economic union. An economic union assumes training enabling persons to take opportunities anywhere in Canada. This is essential for labour mobility. Nova Scotia will not train for jobs in Manitoba. A federal role is necessary.

Concurrent federal/provincial jurisdiction over transportation, communications, trade and commerce manpower training and economic development should be expressly subject to federal paramountcy as essential to the economic union. Any transfer of presently federal exclusive power to concurrent federal/provincial powers should maintain federal paramountcy in fields essential to the economic union. This principle should guide Nova Scotia's response to any proposal for transfer to the provinces of federal powers necessary to regulate an economic union.

6. Canada's Priorities -- "National Glue"

Canada's priority is what this paper calls "national glue". We need a reason to go on living as a nation. This paper has suggested significant shifting of powers into concurrent jurisdiction. This flexibility must be countered by unifying principles which bind us as Canadians. Symbols are important. We hear Americans say "You can't do that to me, it's unAmerican". Canadians do not think this way. Even the Charter of Rights borrows principles from other sources and nations. Canadians are searching for a distinctive national inspiration. There may be a referendum in Quebec within several years. National symbols will be crucial in the campaign. Sovereignists will give Quebecois a "vision" of Quebec. What competing "vision" of Canada will they have?

We are not speaking of trite patriotism. We mean principles, either recognized or assumed by the constitution, which define us as Canadians.

One example is the equitable principle that every Canadian is entitled to minimum standards of public services through the commitment to redress of regional economic disparities in Section 36. Another would be the economic and personal freedoms inherent in the economic union and Charter of Rights. Still another would be Canada's tolerance of diversity implicit in the significant shift from exclusive to concurrent legislative powers proposed in this paper. To embody these principles nothing need be added to the Constitution except the recommendations set out above. The "Canada Clause" in the recent

federal proposal will repeat principles already established elsewhere in the Constitution. We have no objection to this, except it is unnecessary. Tautology does not inspire.

We suggest only one further commitment be added to the Constitution. **We suggest that the constitution contain a Charter of Social Rights -- a commitment directly to individuals that they are entitled to certain minimum standards of well-being for health, education, and social services.** There is debate whether such a charter should be legally enforceable. This committee feels that **the Social Charter should not be legally enforceable.** Governments may be subject to political sanctions to comply with such a commitment. Courts are not equipped to balance the many factors involved with economic and social policy.

But we should not scorn the inspirational symbolism of a constitutional **political** commitment from governments **directly to individuals.** At least politically -- in an election campaign to his candidate -- a Canadian could say "You can't do that to me -- it's unCanadian".

The Meech Lake Accord contained a step in this direction recognition that shared cost programs should be compatible with "national objectives". The text of Meech Lake was inert bureaucratise. Meech Lake declared rights between governments. Section 36(2) of the Constitution Act, 1982 (equalization) is a commitment between governments. Inspiration comes from people. The stirring messages of the American and French Constitutions bypass politicians and give voice to the people ("We hold these truths to be self-evident..."; "We the people declare..."). The key to our recommendation on the Social Charter is a commitment to people. We need a constitution directed to Canadians instead of politicians. This is the "national glue".

The federal government has proposed placing "property rights" in the Charter of Rights. Some have suggested that this is a bargaining chip for the federal government to trade against the proposed Social Charter or is a paean to government backbenchers. **Nova Scotia should oppose the entrenchment of "property rights" in the Constitution. The Fifth Amendment to the U.S. Constitution** protects "property" unless deprived by "due process of law". This has engendered judicial doctrines and tortured variations of "substantive due process", allowing unelected judges to make value judgments on economic policy. In the 1930's, after the U.S. Supreme Court upset social legislation enacted for redistribution of wealth, President Roosevelt threatened to pack the Supreme Court with "New Deal" sympathizers to reverse the Court's defence of "property" as "substantive due process". "Property rights" should not be entrenched in the Constitution for the same reason that the "Social Charter" should not be enforceable in Court. The court is not equipped for social and economic policy decisions. Further, entrenchment of "property rights" may endanger the protected rights of disadvantaged persons or minorities and the other freedoms now guaranteed in the Charter. "Property rights" would constantly collide with these other interests. The "property" guarantee would become one of the most litigated provisions of our Constitution. Nothing in the current constitutional debate mandates such an intrusive, unpredictable and possibly regressive step.

7. Summary of Recommendations

In summary, we recommend the following:

- (1) The Atlantic Provinces should be unified at the negotiating table.
- (2) Nova Scotia should adopt limited, clear and politically saleable priorities.
- (3) Nova Scotia should propose an asymmetrical or "distinct" status for Quebec, achieved through interdelegation (if this is possible) or, if this is not acceptable to Quebec, through concurrent provincial/federal jurisdiction with provincial paramountcy. This would only apply to those fields of jurisdiction which are not essential for maintaining a national identity in the long term, or would be subject to federal paramountcy in the definition of national standards in those essential fields.
- (4) Nova Scotia should oppose any restriction on the principle of redress of regional economic disparities or equalization payments.
- (5) Nova Scotia should oppose any restriction on the federal spending power insofar as it would affect Nova Scotia or any province which wishes to maintain federal spending power. This includes limitations on federal spending power in the areas (mining, forestry, tourism, manpower training, urban/municipal matters, housing, recreation), which the federal government has proposed to transfer to exclusive, provincial jurisdiction. If Quebec wishes to limit federal spending power in Quebec, then this should be achieved by permitting provinces to opt out of national spending programs, with compensation subject to federal "national objectives". The compensation should be cash, not tax points.
- (6) Nova Scotia should demand that Canada become a full, effective, national economic union. The Constitution should provide that all federal or provincial governmental or statutory economic barriers to the free-flow of goods, services, labour and capital be invalid. Regional development measures and equalization would be excepted. Barriers to the economic union would require approval after open debate by an Upper House having weighted representation from the smaller provinces.
- (7) Nova Scotia should insist on maintaining the status quo (federal exclusive jurisdiction) over the offshore fishery.
- (8) Nova Scotia should ensure that the federal proposal to abandon the "declaration power" does not prejudice federal operation or spending for Devco.
- (9) Any concurrent federal/provincial jurisdiction over transportation, communications or trade and commerce, manpower training and economic development should be expressly subject to federal paramountcy as essential to the economic union. Any transfer of presently federal exclusive power to concurrent federal/provincial powers should maintain federal paramountcy in fields essential to the economic union. This

principle should guide Nova Scotia's response to any proposal for transfer to the provinces of federal powers necessary to regulate an economic union.

- (10) The Constitution should contain a Charter of Social Rights -- a commitment directly to individuals that they are entitled to certain minimum standards of well-being for health, education and social services. The Charter should not be legally enforceable.
- (11) Nova Scotia should oppose the entrenchment of "property rights" in the Constitution.

PART II: GOVERNMENT INSTITUTIONS

Nova Scotia and the Constitution: Senate Reform

1. Introduction

Why should Nova Scotia bother to develop a position on Senate reform in preparation for the upcoming round of constitutional talks? There are several very good reasons:

- (1) The "triple- E" proposal, with its equal provinces concept, has caught the attention of the media and the interested public. Anathema to the Ontario and Quebec governments, and regarded in some quarters as an unsound concept for a parliamentary system, it seems to have stimulated interest in the whole idea of Senate reform.
- (2) There are important political forces attached to the triple-E proposal, notably, the western-based Reform Party, most Alberta politicians, organizations like the Canada West Foundation, public opinion west of the Ontario-Manitoba border, and, in the east, Premier Wells. It is hard to imagine a successful constitutional deal that does not seek in some way to propitiate such forces on the issue.
- (3) The governments of Ontario and Quebec have conceded the possibility that they might discuss Senate reform.
- (4) Most important of all, Senate reform is one of the few constitutional issues on which Nova Scotia could realize a net gain in its position within Confederation. This cannot be overemphasized. Nor ought it to be forgotten that in prying open the Senate question, Canada's post-Meech travails have had the effect of serving up the only serious opportunity for reform of the institution since 1867.

2. Nova Scotia's Interest in Senate Reform

2.1 The "Small Province" Position

A small province like Nova Scotia can pursue two very different objectives in the second chamber of the national legislature of a federation. One is to check the power of the national government, presumably in order to help retain for the provinces generally the

full scope of their constitutional jurisdiction. This follows the model of interstate federalism, a model that does not favour the kind of vigorous intrusion into provincial spheres of power that normally accompanies the Canadian Parliament's use of the federal spending power.

The other is to represent the province's interests in national policy formulation -- intrastate federalism. This objective denotes a more favourable attitude to national policy initiatives, even if they are rooted in provincial spheres of jurisdiction. The intent is to ensure that national governments require the consent of small provinces as well as large ones for such initiatives. Nova Scotia's experience in Confederation suggests that it ought to pursue this second objective, particularly in the light of the steady decline of its proportion of the country's population.

2.2 Nova Scotia and Confederation

J. Murray Beck records that in the first federal general election, which included four provinces, Nova Scotia returned 19 members out of a total of 181. Together with New Brunswick's 15, this amounted to 18 percent of the seats in the House of Commons. In 1925, Nova Scotia, New Brunswick and PEI held 29 out of a total of 245 seats, or just under 12 percent.¹ Today the same three provinces are assigned 25 seats out of a total of 295, or 8.4 percent. There are no signs on the horizon that would indicate a reversal of the demographic trends which underlie these figures. Therefore, so long as the House of Commons is based on the principle of representation by population, there is no hope of gaining more seats and influence in it. Does this matter? The province's history within Confederation, particularly in the twentieth century, suggests that it does. In his account of the Maritime rights movement, 1919-1927, E. R. Forbes illustrates the difficulties that the federal representatives of small provinces encounter when the only forum available to them is the disciplined parliamentary caucus. Forbes describes how the Conservative party managed to put itself at the head of the Maritime rights campaign, and turn in an impressive showing in the 1925 general election, winning 11 out of 14 seats in Nova Scotia, 10 out of 11 in New Brunswick, and splitting the Island's 4 seats with the Liberals. Armed with such a mandate, what was the next move for the Conservative MPs? Their dilemma was obvious and instructive -- the dilemma of the minority-in-protest within British-style parliamentary systems in the age of mass parties.

According to Forbes, the errant Tory, F. B. McCurdy of Nova Scotia "had the clearest understanding of how difficult it would be for a small minority of Maritimers to significantly influence policy within a federal party caucus or cabinet."² McCurdy, certain that the traditional parties would never adopt national economic policies suited especially to Maritime interests, wanted Maritime MPs to form a nonpartisan coalition at the provincial level, and work towards a revised, looser federalism in which the eastern provinces would exert greater control over their economy, particularly on such vital matters

¹ Pendulum of Power (Scarborough: Prentice-Hall, 1968), 12, 174.

² The Maritime Rights Movement, 1919-1927: A Study in Canadian Regionalism (Montreal: McGill-Queen's, 1979), 156.

as the tariff. This was impossible, of course, because Maritime economic interests were divided on the tariff issue. There could not be a common stand.

By contrast, W. H. Dennis, publisher and managing director of the Halifax Herald, the Mail and the Sunday Leader, thought that the Conservative MPs could somehow take an independent regional stand, yet remain loyal members of caucus, a view that Forbes judges to have been naive then. Dennis, he writes, underestimated completely the pressure to conform within caucus. In any event, it did not take long for Dennis and many other Maritimers to come to appreciate the premium that a struggling opposition leader like Arthur Meighen attached to caucus solidarity. Meighen could not tolerate open dissent from the party's position on an issue.³

This foray into the province's political history might be thought to be academic if it were not for the fact that the so-called Maritime Rights movement that developed during the post World War I period was a response to economic and political changes that must have seemed as serious to people then as the constitutional crisis today appears to us. Certainly they thought them serious enough to pursue something of an alternative political strategy. As is well known, the government of Mackenzie King sought to handle the problem by establishing the Royal Commission on Maritime Claims to inquire into the subjects of most concern: federal subsidies to the provinces, transportation policy (freight rates and ports) and trade policy (tariffs). The establishment of the commission was generally well received in the region. But the striking and obvious point is that there needed to be one at all. At the time, the King government was not overly popular in Ontario, either, but there was no talk of a royal commission on Ontario claims. Ontario never needs to talk to the federal government through a Royal Commission.

2.3 Nova Scotia and the Present Crisis

Once again, it seems, the eastern provinces face ominous economic portents. In a recent analysis of the likely effects of current economic developments on the constitutional crisis, the economist T. J. Courchene argues that the federal government is increasingly unable to pursue redistributive policies designed to shelter particular regions from market forces. He expects that the federal government will retain its redistributive function in a revised federation but that the redistributive emphasis will shift from "place" to "people." The shift might take the form of a "social-policy Charter" that parallels the Charter of Rights and Freedoms.⁴ Well, if Courchene is correct, then a major purpose of the country's wealth redistribution efforts will disappear. Throughout this century, schemes for the economic development of the Maritimes have been based on policies that privilege place rather than people. The whole idea has been to use incentives of one kind or another to coax industries into locating here that otherwise would make different decisions. If the economic context of the constitutional crisis, then, is an economic sea change, it

³ *Ibid.*, 124-157.

⁴ "Canada 1992: Political Denouement or Economic Renaissance?", draft paper prepared for a conference on the "Economic Dimensions of Constitutional Change" organized by the John Deutsch Institute for the Study of Economic Policy, Queen's University, 4-6 June 1991, 23-24.

would seem more important than ever for the Maritime provinces, and particularly Nova Scotia, to avoid a replay of the post WWI years, when recourse to royal commissions was the only thing on offer, and seek instead a structural change in the national government that would open up more opportunities for the region's representatives to influence national policy. The only candidate for structural change is the Senate.

3. Senate Reform Proposals

3.1 "Triple-E"

It is obvious that Quebec cannot be expected to take seriously the idea of a triple-E senate. Courchene thinks it equally far-fetched to imagine that Ontario could be persuaded to consider it; similarly British Columbia. "Why," he asks, "would the three have provinces, with roughly 75 percent of the population of ROC, transfer 2/3 of the votes in an upper chamber to the have-not provinces?"⁵ Why indeed. What is the point of examining a proposal weighed down by such obvious disadvantages? There are two points.

One has already been mentioned, namely, the fact that some politicians and political parties, undoubtedly cognizant of triple-E's cachet with an element of the voting public, have transformed their own support for the idea into a public position on the constitution. Therefore the proposal cannot be dismissed out of hand. A second point is that an examination of triple-E is useful for working out Nova Scotia's preferred position on the Senate. For example, it straightens out thinking on the meaning of ideas like the "equality of the provinces." The analysis that follows is based on the report of the Alberta Select Special Committee on Upper House Reform, which is entitled: "Strengthening Canada: Reform of Canada's Senate." It was released in March, 1985, and again in 1988. The Alberta proposal was "affirmed in principle" at the Western Premier's Conference in 1989. Alberta's proposal is a full-blown affair that moves well beyond the rhetoric of "equal, elected, effective." A description of it under these headings is unfair, but not misleading, and it carries the advantage of economy. The equal part is simple: equal provincial representation -- 6 per province and 2 per territory. So is election: a first-past-the-post system (single-member plurality); a term of office equivalent to the life of two provincial legislatures; staggered elections, with half of the province's senators elected at each provincial election.

The effective element, or the powers of a triple-E senate, introduces real complications. Basically, the special committee proposes that the Senate's power vary with the bill in question. So, on non-money bills, the House can override the Senate's amendment/veto only by a vote of equivalent proportions + 1 (if the senate amends a bill by a 60 percent vote, the House can defeat the amendment by a vote of 60 percent + 1). On taxation and money bills, the House can override the Senate's veto by a simple majority. On supply bills, the Senate has no veto, which presumably means that it cannot

⁵ Ibid., 19.

hold up spending. On the other hand, the committee also recommends that the Senate have the power to amend any bill, which means delay.⁶

Another set of recommendations on Senate organization reveals the strong anti-party theme of the report. In an effort to abolish the traditional government-opposition stance, the committee wants to seat senators in their provincial delegations in a horseshoe formation, and to establish a Senate executive (steering committee) composed of delegation chairpersons. Further, senators would not be eligible to serve in the cabinet. The committee is clear about its purpose here: "The Committee recognizes that it would be extremely difficult, if not impossible, to eliminate party influence over Senators. However, changes [such as the ones mentioned] can be made to the internal organizational structure which will go a long way towards lessening this influence....The primary focus of the Senate should be to attempt to bring together regional viewpoints as they relate to national issues."⁷

There are many other recommendations, but even this brief description indicates that the committee means business when it comes to an effective second chamber. Thus the central question arises: irrespective of its political chances, is the triple-E Senate a good Senate from the point of view of Nova Scotia? The only way to answer this question is to begin with another: in what lies the effectiveness of a triple-E Senate? Is it effective because it represents regional diversity? Or is it effective because it can thwart executives sustained by majorities in the House of Commons? Surely it is the latter. The triple-E Senate cannot be effective unless it produces majorities tilted against the government at least some of the time. Otherwise there is no way of forcing the government to make concessions or rethink its initiatives. Now the connection between representing regional diversity and battling lower house majorities might prove disconcerting if it should transpire that the greater the regional diversity, the more difficult it is for an upper house majority to form and vote against the government. In other words, equal might well undercut effective.

As indicated at the beginning of the paper, the purpose of Senate reform for a small province like Nova Scotia is better, more forceful representation of the province's interests in the formulation of national policy. Logically, that points to a small provinces' upper house. But as Campbell Sharman points out in "The Australian Triple-E Senate: Lessons for Canadian Senate Reform," parliamentary systems do not sustain such houses. These systems are obviously majoritarian, and therefore pit adversaries against one another: government versus opposition. Modern mass parties with their need for organization and discipline only deepen this adversarial predisposition. Referring to the Australian Senate, Sharman writes: "If the Senate has proved to be a 'states' house other than in the mode of its election, it has only been in the sense of an occasional forum for regional grievances, not in the sense of an institution giving effective articulation of the regional diversity of

⁶ Report of the Alberta Select Special Committee on Senate Reform (Edmonton: Plains Publishing Inc., 1985), 31. Obviously there are plenty of unanswered questions. When is an amendment tantamount to a veto? Are the matched voting majorities based on majority of members or majority of members present and voting?

⁷ Ibid., 38. Naturally in this scheme there would be no government and opposition leaders.

views within the federation. As in Canada, this has been left to the state government, and especially to the office of premier."⁸

The triple-E proposal is a blueprint for a small provinces' house drafted by a committee fully aware that parliamentary systems place a premium on party over region. Hence the organizational devices designed to prevent members of provincial delegations from seeking out partisan allies. But they are weak things when set against the established thrust of parliamentary systems. Moreover, the committee miscues on the electoral system. It proposes the same SMP system used to elect MPs, except that senatorial candidates would run province-wide. The SMP system penalizes independent candidates and candidates appealing to minorities. It is a winner-take-all system that rewards candidates with more votes than their nearest competitors. Since senatorial elections are to be held at the same time as provincial elections, it is highly likely that provincial parties would contest the Senate elections too. They might as well. If that happens, the provincial delegations would be composed of partisans -- provincial party people. Moreover, since only half of them would be elected at each successive election, they might well be partisan enemies. In sum, the triple-E proposal would import provincial party systems into the Senate, a most interesting prospect given the variations across the country.

The Alberta committee is so concerned for region to triumph over party in the Senate that it overlooks the diversity reflected in provincial party systems themselves. Indeed, parties unique to a given province might well hold the balance of power in the Senate. However, there are no parties unique to Nova Scotia, which means that the province's senators would undoubtedly be oppositionists or government supporters. Could they act as articulate spokespersons for the province's interests? Perhaps. Would they act as legislators, that is, make amendments to government bills? Possibly, circumstances permitting. A triple-E Senate that reverted to a partisan chamber might not prove as strong a counter to the government as the committee sought to establish. But certainly it would enhance Nova Scotia's position at the federal level, as it would that of all the provinces except, of course, Ontario and Quebec.

3.2 The Aucoin Proposal

In an article prepared for the Royal Commission on the Economic Union and Development Prospects for Canada, political scientist Peter Aucoin presents an entirely different model of Senate reform.⁹ This is hardly surprising since his purposes are not the same as those of the triple-E's architects. Aucoin seeks in Senate reform a way to strengthen the national government by making it more politically representative of the country, and therefore more legitimate in the eyes of citizens. The Alberta committee, by contrast, is content to state that the triple-E Senate's major purpose is to represent the

⁸ Western Perspectives, Canada West Foundation (May 1989), 4.

⁹ "Regionalism, Party and National Government", in Peter Aucoin, Research Coordinator, Party Government and Regional Representation in Canada, (Toronto: University of Toronto Press in cooperation with the Royal Commission on the Economic Union and Development Prospects for Canada and the Canadian Government Publishing Centre, Supply and Services Canada, 1985), 137-160.

regions in federal decision making; its minor purpose is "sober second thought." Further, Aucoin pursues his objective on the basis of a vastly different theory of party.

Unlike the Alberta committee, Aucoin regards political parties in Canada as coextensive with, and inextricably bound up with responsible government. Rather than battling with them, he chooses to use them -- and possibly improve them. Working on the assumption, then, that an elective upper house will be dominated by party, he is essentially looking for an electoral system for it that will have the effect of complementing or strengthening the parties already competing in the lower house, that is, enhancing their overall geographic representativeness and elevating the calibre of their representatives. His argument is that if an elected Senate can do this, then the legislature as a whole will benefit, and the benefit will outweigh the cost. The cost, borne by the federal cabinet, is the vaunted efficiency or, more accurately, power, of cabinet government. It would not be able to dominate the legislature in the way it prefers.

The main features of Aucoin's proposal are these: an allocation of seats that favours region over population but falls far short of equal provincial representation -- rather like the existing allocation; an electoral system of proportional representation; a suspensive veto. Beginning with seat allocation, Aucoin's view is that the federal principle does not require equal provincial representation, only "a weighting in favour of regions against population."¹⁰ He does not elaborate the point, but the argument has to be that the federal principle in Canada does not and never has required the state equality principle owing to the geo-political-cultural make-up of the country, that is, the difference between Ontario and PEI and Quebec, coexisting as they do in a federation of only ten provinces and two territories. Certainly the founding fathers rejected the state equality idea, substituting instead the idea of regional equality, the "regions" being defined with a solid eye on wealth and population, the twin bases of political power in a constitutional democracy.

The choice of the system used to elect senators is the key to the whole proposal. Aucoin's choice is proportional representation. His argument is based on the assumption, noted earlier, that the parties cannot be restrained from contesting senate elections. The incentives to do so are too obvious and overwhelming. The government will want to control the Senate, and the opposition will want to prevent that from happening. There is no point in duplicating the electoral system of the Commons. Indeed, since the Senate is likely to be smaller, the result would be merely to exaggerate the winner-take-all effect of the SMP system. Aucoin prefers a system that counters this feature by reflecting accurately the parties' share of the popular vote, which proportional representation is designed to do. The parties, and certainly the governing party, would gain representation in the Senate from all regions of the country. Thus the party caucuses would be better balanced in regional terms. Senators would perform the role of a regional check on their Commons colleagues in caucus.

¹⁰ *Ibid.*, 151.

On the final point, the suspensive veto, Aucoin's view is that the power of delay is sufficient for a federal check on the government. Thus the government remains responsible to the Commons alone. This point is especially important if, as expected, a Senate elected on a proportional system does not produce a government majority. No government would need to worry about being brought down by the Senate. As Aucoin points out, this means that the practice of party government would not need to undergo dramatic change.¹¹

Does the Aucoin model offer Nova Scotia anything more than the triple-E model? Both models hold out the prospect of increased representation in the federal decision-making process, although the triple-E senate obviously gives the province a stronger hand in relation to the larger provinces. A more complex question concerns the quality of representation. It is hard to see how the triple-E's SMP electoral system would improve it. In province-wide senatorial elections that are run simultaneously with provincial elections, the winning candidates will likely be members of the winning party, that is, the party with the largest popular vote. Indeed, these might come to be regarded as "safe" seats at the disposal of the front-running party. A party can use safe seats to parachute into office unelectable or reluctant but talented individuals. Therefore the triple-E proposal opens possibilities in this respect. But the use of the SMP system puts paid to the idea of representing diverse party opinion in the province. And it effectively closes the door to independents.

With proportional representation, the Aucoin model retains the potential safe seat advantage because parties will run lists, and the names at the top are practically guaranteed a seat. (Of course, this is a way of electing deadbeats, too.) In addition, however, it meets the test of representing a wider spectrum of political opinion because the minority vote is not "lost" -- parties gain seats in proportion to their share of the popular vote. Finally, it is friendly to independent candidates if the election is run province-wide and the system in effect is the single-transferable-vote (STV), which allows voters to rank candidates and utilizes a quotient or threshold of exclusion sufficient to elect a candidate. Over time, this model could produce a house of individuals of a somewhat different type than their Commons counterparts in terms of diversity -- and possibly independence.

Independence, that is, the independence of the second chamber from the government, is an important consideration for a small province. Since Aucoin prefers to avoid the responsible government problem by restricting the Senate's power to a suspensive veto, it is important that the Senate's electoral system deny the government a majority in that house too. Otherwise there is insufficient leverage for regional representatives to challenge government policy or wring concessions on government bills.

A final consideration for Nova Scotia reverts to the purpose of the model, which ultimately is to strengthen the legitimacy of the national government. Would that serve the province's interests? Those who fear for the fate of a "have-not" province in a decentralized Canada and who put great stock in the federal government's role of redistributing the country's wealth should find the scheme's explicit purpose attractive.

¹¹ *Ibid.* 152.

They will want to consider carefully whether the design would execute the purpose. On the other hand, those who prefer a diminished role for the federal government in the federation will find the scheme inefficient and unnecessary, and look more kindly instead on one that represents provincial governments at the federal level. This is what the Germans do.

3.3 The German Model

On occasion the West German Bundesrat, unique among second chambers in parliamentary systems, has excited students of Senate reform in Canada. Indeed, it inspired the proposals of the British Columbia government, 1978,¹² the Canadian Bar Association Committee on the Constitution, 1978,¹³ the Pepin-Robarts Task Force, 1979,¹⁴ and the Constitutional Committee of the Quebec Liberal Party, 1980.¹⁵ What are the key features of the Bundesrat?

Under Article 51 of the German constitution, the members of the Bundesrat are specified members (mostly ministers) of the Land governments who are appointed by those governments. They are executive delegations, in effect, and they vote en bloc. Thus the membership of the Bundesrat varies with the changes in the Land governments. Further, while each delegation votes en bloc in accordance with instructions from its government, the votes are weighted somewhat in favour of population. The most heavily populated states cast 5 votes each, the next populous 4, and the least populous 3. Decisions are taken by majority vote.¹⁶

From the standpoint of traditional bicameral governments, the Bundesrat model is striking precisely because it incorporates state executives into a national legislative body. The state delegations represent only the state governments. But the jurisdictional context of the Bundesrat is very different from the Canadian one. In Tocqueville's language, it could be described as legislative centralization coupled with administrative decentralization. The governing principle is that federal law takes precedence over Land law. The federation (Bund) possesses the bulk of legislative powers, either exclusively or concurrently, and where powers are concurrent there is federal paramountcy. The Land governments take the legislative lead in three areas: education (excluding the university level); local police; and local government processes. On the other hand, the Lander administer much federal as well as state law. Thus the Bund relies on them to carry out

¹² British Columbia Constitutional Reform Proposals, Vol. 3, "Reform of the Canadian Senate", 1978.

¹³ Towards a New Canada, (Montreal: Canadian Bar Foundation, 1978).

¹⁴ The Task Force on Canadian Unity, A Future Together, January, 1979.

¹⁵ A New Canadian Federation (The Beige Paper), January 1980.

¹⁶ Yves Meny, Government and Politics in Western Europe: Britain, France, Italy, West Germany (Oxford: Oxford University Press, 1990), 159-60.

federal policy. In this context of federal-state administrative interdependence, an upper house of state ministerial delegations is functionally rational.

The Canadian federal context could hardly be more different, since the provinces are jurisdictional powerhouses by comparison with the Lander. In adapting the Bundesrat model to the Canadian case, the Pepin-Robarts task force takes account of this by proposing different decision-making rules for different categories of legislation. For example, exclusive federal matters would not require the approval of the "Council of the Federation" at all. Concurrent matters yielding to federal paramountcy would be subject to a short suspensive veto; concurrent matters yielding to provincial paramountcy would be subject to a longer suspensive veto. Finally, such matters as the exercise of the federal spending power within provincial areas of jurisdiction and the proclamation of a state of emergency in peace or wartime would require a two-thirds majority of the Council. The Council, itself, could not initiate bills, excepting bills that propose constitutional amendments.

The task force recommends that the federal government not be responsible to the Council, which means it cannot provoke dissolution. This feature, when added to the varied decision-making rules and the executive composition of the provincial delegations, indicates clearly that the Council is not a legislative house. It is a house of intergovernmental relations. It is an expression and an instrument of executive federalism. Would it suit Nova Scotia?

There are two common predictions made about the model in the Canadian context: it would have a decentralizing effect; it would prove obstructionist. Predictions are speculative. Nevertheless, it is notable that reform schemes favouring the Bundesrat model almost always include recommendations on jurisdiction that enhance the provinces' position at the expense of the federal government, sometimes marginally (Pepin-Robarts), sometimes less marginally (the Constitutional Committee of the Quebec Liberal Party). It is ironic, if logical, that this should be so, since the German upper house functions within a highly centralized lawmaking system. In any event, those who think that Nova Scotia might benefit from a decentralizing institutional impulse in the national government will welcome the proposal.

The speculation on obstructionism is based on the argument that the federal government is already subject to sufficient checks from strong provincial governments and the Supreme Court of Canada, now armed with the Charter. A third check in the form of a powerful second chamber representing provincial governments seems excessive. If it is conceded that the Bundesrat model would supply this third check, which is not the same as outright obstructionism, then the crucial point for Nova Scotia is the weighted vote. The smaller provinces could not hold out against a coalition of larger provinces, coalitions that disciplined ministerial delegations might find easy to form. By comparison, under the Aucoin model, Ontario's senators would be divided by party, a situation offering room to manoeuvre for small-province senators seeking allies.

4. A Nova Scotian Proposal for Senate Reform

4.1 The Political Constraints

As stated at the outset of the paper, Nova Scotia's objective in Senate reform is to gain a more effective way to represent its interests in national policy formulation. Assessing competing proposals against this objective illustrates the obvious: the best house is a small-provinces house, that is, an elected house that features equal provincial representation; the worst house, other than the existing one, is a large-provinces house that is designed to encourage the larger provinces to work with their allies in the House of Commons, where they are heavily represented already. However, it is obvious that Ontario and Quebec cannot be expected to give a moment's consideration to anything resembling a small-provinces house. This is the first constraint.

The second constraint is imposed by the western provinces and its election. They might be beaten back on their highly publicized demand for equal provincial representation. They will not budge on the principle of election, which rules out the Bundesrat model.

The third constraint, imposed by the Ontario-Quebec-Ottawa axis, is the primacy of responsible government. These governments will insist that executives based on partisan majorities in the lower house not face a second chamber capable of obstructionism, or, worse, deadlock. On this point, it should be well understood that political tradition is on the side of the axis. If the Canadian Senate was anything more than the hybrid monster Christopher Dunkin, Liberal MP from Brome, thought it was in 1864, it was a pale imitation of the House of Lords, and, like the Lords, its purpose was to represent an estate or at least an interest within the body politic -- the propertied. Since it was denied the legitimacy of a popular mandate, it never offered a counter to the growing consolidation of power in the federal executive -- strong cabinet government. More accurately, the rare times that it tried, as in the Senate's recent opposition to the government's goods and services tax, it disgraced itself. The checks and balances implicit in vigorous bicameralism are foreign to the Canadian style of governance.

4.2 Senate Functions

Given these constraints, Nova Scotia's position is exceedingly difficult. It needs to facilitate consensus, work out compromises, while at the same time keeping its own objective constantly in view. Certainly no one else will. Best to seize the initiative and begin with the idea of a second chamber that is designed to fulfill functions which do not immediately raise the spectre of confrontation with the government, but are at the same time useful to a small province. One idea is to require the Senate to adopt a unique focus. The idea follows a recommendation contained in the report of the Group of 22. The group envisages a Senate that: reviews government bills in the area of federal-provincial relations (not necessarily all bills); oversees the development and enforcement of national standards, particularly for federal programs that fall within provincial fields of jurisdiction; and

reviews appointments to federal agencies like the CRTC, the NEB and the Bank of Canada.¹⁷ Another type of task, and one averted to in the advisory committee's paper on the division of powers, involves maintaining the free flow of goods, labour and capital within the economic union. Tasks like these point the Senate in a different direction than the House, thereby minimizing opportunities for conflict between the two bodies. However, a Senate that is useful to Nova Scotia must retain full power to review and vote on all bills, which means there will be conflict from time to time between the Senate and the Commons. Such conflict is a sign the Senate is working. Too much conflict between the houses would be unproductive, of course. But there are ways of moderating it. For example, the Senate might possess only a suspensive veto on appropriations and tax bills. Another conflict-mediating technique is the conference committee composed of members from each house who meet to sort out differences on a given bill. The American Congress utilizes this device.

4.3 Senate Structure

Beginning with function, and then employing the difference principle, helps meet the third constraint, or at least suggests a way out of it. The first and second constraints affect the structure of a new Senate: equality versus weighted representation; election versus appointment. The models reviewed in the paper combine these elements differently. Triple E pairs equality and election; the Aucoin proposal joins election with weighted representation; and the Bundesrat model unites appointment and weighted representation. For a small province, equal provincial representation and election are the strongest counter to representation by population in the lower house, while provincial government delegations casting votes weighted in accordance with provincial populations are arguably the weakest. Thus the compromise small-province position is election and weighted representation. Of course this is also the compromise position for the western provinces and the Ontario-Quebec-Ottawa axis. Is this a neat dovetailing of interests?

The answer depends on the type of electoral system that is employed and the timing of elections. The conventional wisdom is that a second chamber in a parliamentary system is likely to act more independently of the government if its members are elected differently from the way members of the lower chamber are elected. Utilizing the same system in both houses of the legislature, on the contrary, is supposed to have the opposite effect. Thus it carries the odour of redundancy. The authors of the Triple E choose the old SMP system, but try to offset the potential redundancy effect by tying the elections to provincial elections. And of course they utilize equal provincial representation. However, once that is replaced by weighted representation, then the SMP system combined with elections that coincide with Commons' elections will produce similar partisan results in both houses. For Nova Scotia, that outcome, while still an improvement over the existing state of affairs, is not an exciting prospect.

If, as is likely, the larger provinces and the federal government reject the notion of tying Senate elections to provincial elections on grounds of instability, and endeavour

¹⁷ Group of 22, Some practical suggestions for Canada, June 1991, 24-25.

instead to link them to Commons elections for obvious and self-interested reasons, then Nova Scotia should press for a different electoral system like proportional representation. Weighted representation and same-timing of the same kind of elections favour the heavily populated centres that already dominate the Commons. A unique electoral system would help to counter this bias by extending the range of interests represented in the second chamber. The governing precedent in a parliamentary system is the Australian Senate which, as indicated earlier, employs the system of proportional representation.

5. Conclusion

In conclusion, in the context of Canadian politics, the best second house for Nova Scotia would possess these features:

- (1) an electoral system of proportional representation;
- (2) weighted representation of the provinces;
- (3) the power to review and vote on all government bills;
- (4) special powers that the Commons does not possess, such as a ratification power over appointments to specified government agencies;
- (5) a modified veto power, possibly a suspensive veto, in relation to tax and appropriations bills.

Nova Scotia and the Constitution: Council of the Federation

1. Definition

The phrase "Council of the Federation" has appeared in a number of constitutional proposals. For example, the report of the Task Force on Canadian Unity, 1979 (Pepin-Robarts report) recommends that a Council of the Federation replace the existing Senate. We examined this proposal for a Bundesrat-style upper chamber in the paper on Senate reform.

By contrast, there are proposals to establish a Council that is **not** an upper chamber, **not** part of Parliament, but a body independent of Parliament. This is the idea under examination here.

2. Existing Proposals for a Non-Parliamentary Council

2.1 Quebec

A non-parliamentary Council was first proposed in 1980 in the report of the Constitutional Committee of the Quebec Liberal Party, commonly known as the Beige

Paper.¹⁸ Most recently, former B.C. civil servant Melvin H. Smith takes it up in his paper on constitutional reform, The Renewal of the Federation: A British Columbia Perspective, 1991.¹⁹

According to the Beige Paper, the Senate should be abolished and the federal Parliament be made a unicameral (one-house) institution constituted by the House of Commons alone. The Council is something else again. It is conceived as a "special intergovernmental institution and not as a legislative assembly controlled by the central government." It is designed to encourage collaboration and cooperation between the federal government and the provinces.

In design, the Beige Paper's Council looks rather like the Bundesrat-style Senate. It is composed of delegations from the provinces, the members of which act on instructions from their respective governments. The decision-making rules that are recommended distribute votes only to the provincial delegations, not the federal government's delegation. Moreover, the vote, which is to be cast "en bloc," is weighted in favour of the populous provinces. The Beige Paper suggests a Council of 80 members, in which PEI casts two votes and Quebec and Ontario cast 20 votes each. The other provinces range between these poles.

The Council's jurisdiction is limited to federal-provincial matters. Essentially it possesses a ratification power. In other words, the federal government would require the agreement of the Council in order to exercise the emergency power, spend money in fields of provincial jurisdiction, engage in interdelegation of powers between the two levels of government, conclude international treaties, and appoint Supreme Court judges and heads of some Crown corporations. Interestingly, the Beige Paper requires only that the Council advise the federal government on macro economic policy and on matters such as the equalization formula.

2.2 British Columbia

Melvin Smith also recommends a non-parliamentary Council, although his scheme differs from that of the Beige Paper in recommending a revised Senate as well as a Council. In other words, while the Beige Paper proposes a reduced, unicameral Parliament and a new intergovernmental institution (the Council), Smith prefers to retain the bicameral Parliament while at the same time adding a new intergovernmental institution.

Smith's Council would perform the same sort of functions in relation to intergovernmental affairs as the Beige Paper's Council, although it appears to be a more powerful body. In addition to controlling the use of the federal spending power, it would also be required to approve federal laws requiring provincial administration. One notable difference between the two proposals concerns the official languages. The Beige Paper

¹⁸ "A New Canadian Federation", published in The Chronicle-Herald and The Mail Star, Halifax, 5 February 1980.

¹⁹ (Victoria: Government of British Columbia, 1991).

proposes a "dualist" committee of the Council, half of the members of which are francophone delegates, that possesses what amounts to a ratifying power over federal government proposals on the official languages, culture, and the composition of the federal civil service. Smith is silent on this issue.

Predictably, the main difference between the two proposals is the decision-making rule. Smith would give each of the eleven governments one vote. Decisions would require seven provincial votes from provinces that together include 50 percent of the population of the provinces, and the vote of the federal government's delegation -- essentially the voting rule of the general amending formula. This proposal differs from the Quebec scheme in two important respects. It gives the federal government a vote, which the Beige Paper does not do. And it follows an equal vote rule that denotes an equality of the provinces, a pointed departure from the Beige Paper's weighted vote rule. The effect is to give the central provinces less leverage than they would have in the Quebec proposal.

3. A Council and/or a Senate?

The Smith proposal raises an obvious question: does Canada need a Council of the Federation and a Senate?

Smith deals with the question by asserting the idea that there are two provincial interests. Thus there are the interests of the citizens of Nova Scotia (versus those of the citizens of other provinces), on the one hand, and the interests of the government of Nova Scotia in some federal policies and programs, on the other. According to him, these two sets of interests are not necessarily the same.²⁰

It is worth pursuing this distinction, because it is not an obvious one. It sounds like government-versus-the-people rhetoric, which suggests that representative governments have different interests from the people. Indeed, it implies that they have interests inimical to those of the people. Do they really?

Smith says there are interests of the citizens of Nova Scotia -- the provincial interest at large. But unless people's interests are identical, it is necessary to specify an interest in something. He says provincial governments have an interest in particular federal programs. Surely that is not unrelated to their perception that provincial voters have that interest too.

If there is a distinction here, it is between general policy and administrative issues. Provincial governments have a deep interest in the details of federal programs that affect them or that they administer themselves. Provincial voters are interested in basic policy issues.

Smith bases his argument for a Senate and a Council on the alleged distinction between the provincial interest at large and the provincial government's interest in federal programs. If it turns out to be a distinction between public policy and public administration, then it is not clear why a new body is required to deal with administration.

²⁰ *Ibid.*, 30-31.

The complex of intergovernmental relations already does this, as Smith himself concedes. What, then, is he after? Obviously he wants an institution in which provincial governments gain a legal say on federal policy and appointment initiatives that directly affect the provinces. He wants an institution that would enable these governments to force the federal government into prior consultation with them. His Council, which is more favourable to the smaller provinces than the Quebec proposal, would accomplish these ends and place a straitjacket on the federal executive in the process.

4. Advantages of a Council of the Federation

The one major advantage of a Council is that it holds out the prospect of a smoother working federalism. Equipped with the sort of powers indicated above, such a body would force the federal government into extensive prior consultation with the provinces on particular initiatives so that, as Smith notes, "when matters actually reached the Council for a vote, a great deal of consultation would have already taken place."²¹ Ideally such consultation would produce closer federal-provincial cooperation and harmonization of effort.

5. Disadvantages of a Council of the Federation

There are at least three, and possibly four disadvantages of the Council.

- (1) First, as envisaged in the two proposals discussed above, and in keeping with the logic of the institution, the Council is not elected federally, although some of its members would be elected provincial politicians. Absent the Senate, following the Beige Paper, and the whole apparatus of government at the federal level would exhibit exactly one elected body, the House of Commons. Such an arrangement is not conducive to open, competitive politics. On the contrary, it is a classic example of an institution of elite accommodation. It entrenches executive federalism. Some would regard this as a regressive step, democratically speaking, of course.
- (2) Second, a Council is not an adaptable institution in terms of minority representation. It is composed of government delegations, not elected representatives, some of whom might represent minority interests in the provincial societies. This point is particularly important if, as the Beige Paper recommends, there is no Senate.
- (3) Three, there is a prospect of undue conservatism. Both Councils, especially the Smith version, are powerful bodies. Staying with that version, the decision-making rule requires more than a mere majority of the votes -- six out of eleven (the Beige Paper's precise rule is unclear, except that Ontario and Quebec control nearly half the votes). It requires eight votes, one of which is cast by the federal government's delegation. Thus any four provinces can block a favourable decision. Such hurdles

²¹ *Ibid.*, 41.

might dampen a federal government's enthusiasm for taking initiatives. Or, they might produce watered-down results out of the initiatives that are undertaken. (On the other hand, the members of the Council will share administrative and political experiences and on these bases they might develop a club-like, amiable atmosphere conducive to accommodation.)

- (4) Neither version of the Council is a nationalizing institution. On the contrary, both are old-style federal institutions which are likely to have decentralizing effects, since their members, with the exception of the federal government's delegation, are not encouraged to take a national perspective on issues. Rather, they are encouraged to promote vigorously a provincial perspective.

6. Nova Scotia's Position on a Council of the Federation

There are two separate considerations.

6.1 The Province's Interest

A Council equipped with the powers outlined in either of the proposals reviewed above is bound to be a powerful institution. It might even eclipse Parliament. For example, any government contemplating spending money in a provincial field of jurisdiction would consult with the provinces in the Council long before it bothered to consult Parliament. In that sense, Parliament would not be sovereign within its sphere of jurisdiction, subject to the Charter of Rights and Freedoms. Instead, more than ever Parliament would find itself presented with a fait accompli. Given the strength of such a Council, Nova Scotia must take a deep interest in the voting rule. Ideally, the province wants equal representation and majority rule -- an equal vote and a speedy decision-making rule. Why? It wants its vote to count for as much as possible, which means Smith's scheme is preferable to the Beige Paper's. On the other hand, it must be remembered that many of the matters before the Council will involve spending. A tough decision-making rule would favour reluctant creditors; an easier one would favour eager recipients. Obviously the larger and wealthier provinces would never agree to an equal vote and majority rule. Nevertheless, Nova Scotia should press for the best voting rule it can get.

6.2 The Nation's Interest

Because of the disadvantages of a Council, as noted above, such an institution might not be an appropriate addition to the federation. If the province takes the view that it would not be a welcome addition, then it must focus its energies on a reformed Senate.

REPORT OF THE ADVISORY COMMITTEE ON ECONOMIC ISSUES

**FUNDAMENTAL ECONOMIC ISSUES RELATING TO
NOVA SCOTIA AND THE CONSTITUTIONAL DEBATE**



REPORT OF THE ADVISORY COMMITTEE ON ECONOMIC ISSUES

FUNDAMENTAL ECONOMIC ISSUES RELATING TO NOVA SCOTIA AND THE CONSTITUTIONAL DEBATE

BACKGROUND

Part I of this Report deals with the fundamental economic issues that arise in the constitutional debate that are most important to the Province of Nova Scotia: i.e., equalization payments, social programs, and the economic union. As demonstrated below, these three key issues are interrelated in complex ways. In a nutshell, however, the efficiency of the economic union that is Canada generates economic returns or a "surplus", part of which is redistributed through the process of equalization payments to enable Canadians to have access to reasonably comparable levels of public services no matter where they live. Without fiscal equalization one could not expect comparable services and without comparable services one could not expect the economic union to be as efficient in generating economic surpluses. For Nova Scotia, a crucial aspect of any constitutional change will be the accompanying set of federal-provincial fiscal arrangements.

Part II of the Report deals with a number of other issues that are expected to arise in the constitutional discussions, including the division of powers, transportation, the spending power, resource sectors, financial regulation and the environment.

The committee has, throughout its deliberations, attempted to distinguish carefully between constitutional issues and issues related to the implementation of economic policy in the present context. The fact that some may think that economic policy is wrong-headed is no reason for believing that constitutional change is necessary to improve performance. The deficit problems of the federal government are, for example, real and important - but this is not inherently a constitutional issue. This point appears to be missed in the Allaire Report and in several reports on the constitution coming from British Columbia, for example.

The key assumption motivating the work of the Committee is that it is necessary to find options that are best for Nova Scotia which maintain the unity and integrity of Canada, while allowing for such asymmetric arrangements as do not run counter to what it means to be a Canadian.

PART I. FUNDAMENTAL ECONOMIC ISSUES IN THE CONSTITUTIONAL CONTEXT

A. INTRODUCTION

The Advisory Committee accepts the view that the maintenance and improvement of the operation of the economic union that is Canada is an important objective of policy. The Committee believes that on balance the free flow of goods, services, people and money within the borders of the country improves the economic efficiency of the system and generates increases in incomes and wealth. Free mobility of products and factors of production generates allocative efficiency - i.e., factors are used where they are most productive and products are sold in markets where they are valued most. Free mobility of people also promotes the diffusion of ideas and increases the rate at which technological change permeates the economy as a whole.

However, the Advisory Committee does not believe that free markets always work optimally in all areas without any policy intervention. If, for example, the ability of provinces to raise revenue from a given tax structure differs significantly, free markets will result in an inefficient flow of factors of production, especially labour, unless federal transfers are used to allow provinces to offer comparable services at comparable levels of taxation.

In Canada this idea is so fundamental that it is enshrined in Section 36 of the Constitution. The Committee is strongly of the opinion that Section 36 be retained and, if possible, strengthened. Furthermore, if national standards in health, education and welfare were to be eroded in some provinces, relatively affluent provinces could expect to be adversely affected by increased net immigration from those seeking better social programs than provided in their former province. Since the rationale for richer provinces to pay into the equalization transfer system is the maintenance of such national standards, the erosion of national standards would imply erosion of the political will to continue the system of equalization payments. If this were to happen, Nova Scotia would be a big loser, along with the other Atlantic Provinces.

The view that equalization payments are important to Nova Scotia is not novel - few people would dispute the fact. The Advisory Committee is concerned that the ramifications of this view be fully understood, that the importance of equalization payments in improving the efficiency of operation of the economic union be underlined, and that the key role of national standards in health, education and welfare in maintaining the efficiency of national labour markets and political support for equalization payments should be acknowledged.

B. THE ECONOMIC UNION

1. How the Current Economic Union Works: Theory and Evidence

An economic union is a geographic area within which there is free movement of goods and services, people and financial capital. An economic union increases efficiency because it allows goods and services to be sold where they are most valuable without

artificial barriers and restrictions on their movement, and because it allows people and other mobile factors of production to move to where their contribution to the generation of economic wealth will be greatest. While there are some theoretical qualifications to the proposition that an economic union promotes efficiency, these are in practice of minor significance. At the present time we are witnessing the establishment of an economic union in Western Europe, and efforts to prevent the break-up of an economic union in the Soviet Union, both testimony to the practical significance of the benefits of an economic union.

Canada is an economic union. This is sometimes forgotten in the confusion of debate on interprovincial barriers to trade and factor movements. There is no question but that restrictions exist in Canada on the free flow of goods, services and factors of production, but these are minor in the overall scheme of things. Canadian provinces trade substantial volumes of goods with one another, and Canadians move freely from province to province in large numbers. The freedom to move within Canada in search of jobs, education or an agreeable climate is one of the most valuable rights that Canadians possess -- whether or not the right is exercised. In fact, most Canadians have close relatives in other provinces, and recognize the value for themselves and their children of the right to move.

The most recent data on the flow of goods between Canadian provinces relates to 1984. Table 1 below, based on Department of Finance data, is taken from T. Courchene, In Praise of Renewed Federalism. As Professor Courchene notes, the table presents data in percentage terms, and not in terms of absolute dollar flows, but the absolute dollar flows are very large. For five provinces (PEI, NS, Quebec, Manitoba and Alberta), sale of goods to other provinces is more important than sale of goods to other countries. In 1984, Nova Scotia was more dependent on inter-provincial markets for its goods (62%) than any other province, and was particularly dependent on other provinces for sales of its primary products (76%). The Table shows that provinces tend to trade heavily with their neighbouring provinces, but the two Central Canadian provinces are important markets, taking 15% or more of the export of goods for all provinces except BC. Nova Scotia in 1984 sold about 24% of its goods to the other Atlantic Provinces, 14% to Quebec, 20% to Ontario, 4% to the West and 38% to other countries.

Data on net migration flows are more up to date than those for trade flows. They show that interprovincial migration continues to be an important component of population change in Canada, and that the flows of people respond to changing economic opportunities in Canada. Table 2 below shows the combined impact of interprovincial net migration on population levels by province for 1976-1990. Since the figures show only net migration, they do not capture the large offsetting movements of population among provinces in both directions. Nevertheless, the impact of net interprovincial migration is considerable. In absolute terms, Quebec was the big loser and BC the big winner from 1976 to 1990: on a net basis, 263,500 persons left Quebec for other provinces in Canada, and 223,600 persons moved to BC from other provinces. In relative terms, Newfoundland lost more people to migration than any other province (8.2%), followed by Saskatchewan (7%), Manitoba (6.9%) and Quebec (4.2%). BC and Alberta were the big gainers in relative terms. Over the period as a whole, Nova Scotia lost 2,600 persons to migration,

or .3% of its population. These substantial interprovincial movements of people are evidence of the importance of the freedom of movement within the Canadian economic union to individual Canadians in all provinces.

Table 3 shows figures on gross and net interprovincial mobility of the population aged 16-69 over a one year period. These figures confirm that migration is an important feature of the Canadian economic union for all provinces. In Nova Scotia, for example, almost 8,000 left the Province and about 2,700 entered, for a total movement in one year of almost 2% of the population of the province aged 16 to 69.

In addition to facilitating the movements of people and of goods, which are measurable, the Canadian economic union facilitates the flow and diffusion of technology, it enables the functioning of a national banking, financial and securities market, and it promotes trade in services as well as goods (i.e., finance, insurance, communications, etc.)

Table 1

Exports of Goods by Destination, Selected Aggregates, 1984
(as a percentage of total exports)

Destination	Mfld.	P.E.I.	N.S.	N.B.	Que.	Ont.	Man.	Sask.	Alta.	B.C.	Total Prov.	Total Foreign
Originating prov: Mfld. Goods	--	0.27	4.49	0.79	7.36	11.07	0.02	0.03	0.07	0.10	24.22	75.78
Originating Prov: P.E.I. Goods	5.67	--	11.13	7.87	9.31	21.33	0.35	0.09	0.33	0.23	56.56	43.44
Originating Prov: N.S. Goods	7.56	3.04	--	12.95	14.49	20.08	0.79	0.47	1.41	1.10	61.99	38.01
Originating Prov.: N.B. Goods	2.99	3.32	9.30	--	16.98	11.52	0.46	0.39	0.86	0.62	46.60	53.40
Originating Prov.: Que. Goods	2.61	0.45	2.86	3.34	--	28.78	1.81	2.67	5.87	4.57	53.66	46.34
Originating Prov.: Ont. Goods	1.26	0.30	2.14	1.54	14.94	--	2.87	2.35	6.58	4.69	37.10	62.90
Originating Prov.: Man. Goods	0.65	0.06	0.75	0.66	8.85	23.81	--	8.75	10.15	4.27	58.41	41.59
Originating Prov.: Sask. Goods	0.01	0.01	0.20	0.13	10.61	12.62	4.90	--	5.32	1.24	35.31	64.69
Originating Prov.: Alta. Goods	0.06	0.02	0.21	1.39	10.25	26.26	3.74	6.55	--	9.95	59.62	40.38
Originating Prov.: B.C. Goods	0.12	0.06	0.21	0.25	2.28	6.80	1.19	2.24	10.09	--	24.87	75.13

Source: T. Courchene, *In Praise of Federalism*, C.D. Howe Institute, 1991.

Table 2
Change in Population As a Result of Interprovincial and International Net Migration
(thousands)

	Population			Net Migration 1976-90			
	1976	1990	change 1976-90	Level		Contrib. to Pop. Growth	
				Prov.	Int'l.	Prov.	Int'l.
CANADA	22,992.6	26,602.6	3,610.0	15.7	1,058.8	0.0	4.6
Mfld.	557.7	573.4	15.7	2.8	-0.1	-8.2	0.0
P.E.I.	118.2	130.3	12.1	10.2	0.8	-0.2	0.7
N.S.	828.6	894.2	65.6	7.9	5.3	-0.3	0.6
N.B.	677.2	723.2	46.0	6.8	-1.9	-2.1	-0.3
Que.	6,234.4	6,769.0	534.6	8.6	201.8	-4.2	3.2
Ont.	8,264.5	9,743.3	1,478.8	17.9	536.1	1.7	6.5
Man.	1,021.5	1,091.6	70.1	6.9	42.4	-6.9	4.1
Sask.	921.3	999.5	78.2	8.5	17.0	-7.0	1.8
Alta.	1,838.0	2,471.6	633.6	34.5	97.7	5.7	5.3
B.C.	2,466.6	3,126.6	660.0	26.8	159.4	9.1	6.5
Yukon	21.8	26.1	4.3	19.7	0.2	-12.5	0.8
N.W.T.	42.6	53.8	11.2	26.3	0.2	-20.2	0.4

Source: Martha Justus, Monthly Economic Review, August, 1991.

Table 3

Gross and Net Migration, Canada and Provinces
Population Aged 16-69, 1986/87

	Net	Gross		Movement
	Difference of In and Out	Out	In	Sum of In and Out
Nfld.	-1.8%	7803 (2.11%)	1673 (0.29%)	2.4%
P.E.I.	+.2%	1073 (1.32%)	1267 (1.55%)	2.87%
N.S.	-.9%	7919 (1.4%)	2705 (0.5%)	1.9%
N.B.	-.4%	7004 (1.5%)	4995 (1.07%)	2.57%
Quebec	-.01%	16217 (0.35%)	15854 (0.34%)	.69%
Ontario	+.36%	22055 (0.35%)	45021 (0.71%)	1.06%
Manitoba	+.31%	8524 (1.23%)	10664 (1.54%)	1.77%
Saskatchewan	-1.3%	12531 (2.0%)	4414 (0.71%)	2.71%
Alberta	-1.2%	40846 (2.6%)	2008 (1.42%)	4.02%
BC	+.3%	18684 (0.95%)	24878 (1.27%)	2.22%
Total	0	142657 (0.8%)	142657 (0.8%)	1.6%

Source: L. Osberg and D. Gordon, "Inter-Regional Migration and Inter-Industry Labour Mobility in Canada", 1991.

2. The Economic Union and Redistribution of Income

Canada is a very successful economic union. The Canadian economy has generated high and rising levels of income and wealth for its citizens since 1867, with relatively minor interruptions. Canadian policy has consistently reallocated the income so that some degree of regional equality has been achieved. In the years following Confederation in 1867, the federal government transferred funds to all provinces owing to the shift in customs revenue to the federal government entailed by the BNA Act. Subsequently, other programmes were developed which expanded the range of federal government transfers: Section C of this Report outlines the current situation relating to federal transfers.

3. Improving the Economic Union

The issues relating to the economic union are of two types: what further gains can be achieved by breaking down existing interprovincial and other barriers to trade and factor movements, and what costs would be borne if the economic union were to be fractured by Quebec separation. The first of these issues is addressed at this point.

A number of commentators have pointed out that Section 121 of the BNA Act which disallows interprovincial tariffs on goods is silent on the treatment of services, and on barriers to trade other than tariffs. Others have noted that Section 6 of the Charter of Rights might be strengthened to prohibit explicitly the restriction of interprovincial mobility. In Atlantic Canada there is renewed interest in Maritime or Atlantic economic cooperation, in areas such as government procurement, transportation regulations, and professional and technical certification of job holders. Initiatives in these areas might be useful, and cooperation among the Atlantic or Maritime Provinces might bring major political benefits from a united front in the constitutional debates. **Nevertheless, all the available evidence suggests that the additional efficiency gains that could be achieved by a more effective economic union are not large as a percent of Gross Domestic Product, impressive as they might look in absolute terms.** In addition, many of the efficiency gains can be achieved without constitutional change - i.e., all of the items under discussion in relation to increased Maritime or Atlantic cooperation. There would be some benefit to clarifying that Section 121 of the Constitution refers to services as well as to goods, and to expanding the scope of Section 121 to include selected barriers to trade in addition to tariffs. However, these are not fundamental constitutional objectives for Nova Scotia. What is fundamental is maintaining the benefits of the economic union as it now operates.

The position outlined above is not as radical as that outlined in Shaping Canada's Future Together. The federal proposals envisage broadening Section 121 to include persons, services and capital as well as goods, and makes reference to moving freely "without barriers or restrictions". The proposed Subsection 3 of Section 121 allows the Parliament of Canada under restrictive conditions to override the free mobility clause. The Advisory Committee has two reservations concerning the federal proposals in this area. First, "barriers and restrictions" might be so strictly interpreted as to rule out such provincial incentives as tax writeoffs for industry which a province felt to be in the interests of its residents. The fact that equalization is exempt in the federal proposals suggests that a strict interpretation of these proposals is anticipated. (The issue is

analogous to the question of the definition of a subsidy under GATT rules). Second, while generally supportive of measures to strengthen the economic union, the Committee believes that at some point a trade-off may be required in the direction of allowing development policies amenable to provincial control. Up to the present the Canadian constitutional framework has been able to handle such ambiguities without excessive cost, and Section 121 as proposed may make the economic union too tight to allow the necessary flexibility for provinces to retain some autonomy in the area of development policies. The basic conundrum is, however, clear: measures to increase the efficiency of operation of the economic union as a whole reduce the capacity for province-building.

4. The Costs of Fragmentation of the Economic Union

While additional gains from improving the economic union are relatively small, the potential losses from a break-up of the economic union are very high. In considering this question, a lot depends on the nature of the divorce. Even assuming the most amicable of separations, some fragmentation of the economic union would undoubtedly occur, especially with respect to the flow of people, financial capital (especially if separate currencies were established) and services (many service transactions require that people move to provide the service). The Advisory Committee has reviewed a considerable amount of recent material which discusses the potential costs of separation, and more is being produced as the debate continues. In general, the Committee supports the view that a break-up would be expensive on the best of terms and close to catastrophic on the worst. Not the least of the consequences would be a loss of political will in maintaining equalization payments.

However, in one area, that of transportation, the Committee has fewer concerns than several commentators. It is a common-place view that separation of Quebec would seriously distort transportation flows into and out of the Atlantic Provinces because of the land gap with Ontario. However, the Committee foresees no advantage to Quebec in cutting off transport links with the Atlantic Provinces. Any interference would be counter to the current provisions of the Canada-US Free Trade Agreement (the FTA), as well, and it is probable that Quebec would be a party to this Agreement in the event of separation. Furthermore, a competitive road transport link through the United States would seriously cramp any move by Quebec to hinder the operation of the road transport network. With respect to air over-flights, few countries have denied fly-over rights to others.

Finally, one has to remember that Quebec's interests lie in maintaining its access to the North American market, by maintaining the right of transit through Ontario and by joining the Free Trade Agreement - if Quebec wants these benefits it will need to grant reciprocal treatment to Atlantic Canada.

5. Nova Scotia's Options With Respect to the Economic Union

Nova Scotia's interests are first, to protect the operation of the existing economic union and second, to support such changes as will improve the operation of the economic union. Maintenance of the economic union is important for many reasons other than economic ones, including the maintenance of Canada as a nation. On the economic side,

fragmentation would reduce the efficiency with which the Canadian economy operates, and, to the extent that social programs would be put in jeopardy by altered circumstances, it would reduce the element of fairness or equity in the economy.

C. TRANSFER PAYMENTS

1. Types of Transfer Payments

Transfer payments from the federal government come in three forms: transfers to governments, transfers to individuals, and transfers to firms.

a. Transfers to Governments

The three principal forms of transfer to governments are through the fiscal equalization program, the Established Programs Financing agreements (EPF), and the Canada Assistance Plan (CAP).

Fiscal equalization

Section 36(2) of the Constitution Act (1982) commits the federal government

.... to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

The equalization program is designed to raise per capita fiscal capacity¹ in the "have-not" provinces (i.e., those with per capita fiscal capacities that are below the equalization standard) up to a level that amounts, in practice, to somewhat less than the national average per capita fiscal capacity.

The fiscal equalization program has been subject to a growth ceiling such that growth of total transfers through equalization cannot exceed the rate of growth of GNP since the inception of the current program. There are also floor provisions which guarantee that a province's entitlement cannot fall by more than 10 percent in any year. In addition, Nova Scotia and Newfoundland have negotiated customized arrangements

¹ "Fiscal capacity" refers to the ability of a province to raise revenue from its residents using a standardized tax structure. It is a relative concept by which the ability of provinces to raise tax revenue is measured. Per capita fiscal capacity from own-sources is measured by applying, for each of the potential revenue sources available to the provinces, a standardized tax rate to the provincial base per capita. A province is designated as being fiscally deficient with regard to a particular base if this potential is less than that for the so-called representative five provinces (Quebec, Ontario, Manitoba, Saskatchewan and British Columbia) on a per capita basis. A province that is, on net, fiscally deficient summed over some 33 revenue sources is designated a "have-not" province and receives a transfer sufficient to raise its overall fiscal capacity up to the representative five province standard. It is in this sense that "equalization" occurs: each of the "have-not" provinces has its per capita fiscal capacity raised to a level equal to that in the representative five provinces. In recent years, this has amounted to approximately 98 percent of the national average fiscal capacity before equalization. However, since the "have-not" provinces are equalized up whereas the "have" provinces are not equalized down, in effect per capita fiscal capacity in the "have-not" provinces is raised to approximately 92 percent of the national average in the presence of equalization.

concerning revenues from the off-shore that further protect their entitlements under the fiscal equalization program.

To the extent that the fiscal equalization program is raising per capita fiscal capacities in the "have-not" provinces to something close to the national average, the mission of the program is partially achieved. Chart I shows the degree to which was achieved in 1987-88. However, provision of comparable levels of public services may cost more per capita in the smaller provinces either because they are less able to attain economies of scale in provision or because "need" may be greater, as for example in terms of the proportion of the population requiring social assistance. There is room for substantial modification in the design of the fiscal equalization program.

Established Programs Financing (EPF)

EPF transfers are equal per capita entitlements payable to all provinces in place of the myriad of matching-grant schemes in health care and post-secondary education that existed prior to 1977. These transfers come in two parts: a tax transfer under which the federal government vacated tax room in the personal and corporation income tax fields, thereby allowing the provinces to increase their collections at no net increase in burden to the tax-payer, and a per capita cash transfer equal to the difference between a province's per capita entitlement and the per capita value of the tax transfer. Since additional tax room is worth more to those provinces with relatively high per capita bases for the relevant fields, the amount of cash transfer per capita therefore varies from province to province. For the "have-not" provinces, since the additional tax room is subject to equalization, the per capita cash transfer will be the same. The situation varies among the "have" provinces.

Per capita entitlement is tied to 1977 levels under the former matching-grant schemes and adjusted annually according to growth in GNP. At various times this has been scaled down in keeping with federal restraint measures and, as of the last two federal budgets, per capita entitlement has been frozen.

Provinces are constrained to meet minimal national standards in health care provision in order to be eligible for EPF transfers. Failure to meet these standards, for example, the imposition of user charges or mobility restrictions, can result in cash penalties. As the value of the cash component of EPF is eroded over time, especially in light of the current freeze, the ability to enforce such rules is compromised. Since the cash component is projected to go to zero at some point in the late 1990s, which varies by province, federal ability to enforce rules may well disappear completely unless something is changed.

EPF transfers are consistent with the language of Section 36(1) of the Constitution Act (1982) which commits both levels of government to pursue policies which promote, among other things, equality of opportunity and provision of comparable levels of public services. However, since the amount of transfer is not tied to provincial expenditures in the program areas, no allowance is made for differences in cost of provision or need across

provinces [e.g., the net inflow of university students from out of province is equal to 20% of total enrolment in Nova Scotia].

Canada Assistance Plan (CAP)

CAP transfers are in the form of matching-grants against a broad range of provincial expenditures in the area of social assistance.

As such, CAP transfers do, in part, reflect differences in need and cost of provision. As with EPF, CAP transfers are consistent with Section 36(1) of the Constitution Act (1982). The last two federal budgets have restricted annual growth in CAP payments to the three have provinces to a maximum of 5 percent.

b. Transfers to Individuals

Transfers to individuals come in various forms including unemployment insurance, Family Allowance, Old Age Security, Canada Pension Plan, Student Loans and the like. In addition, tax credits are allowed through the personal income tax. Some transfers, such as UI payments, are tied to the place of residence of recipients, others, such as CPP and Family Allowance, are not.

c. Transfers to Firms

Transfers to firms involve direct subsidies and various tax transfers - including, for example, the Cape Breton Tax Credit.

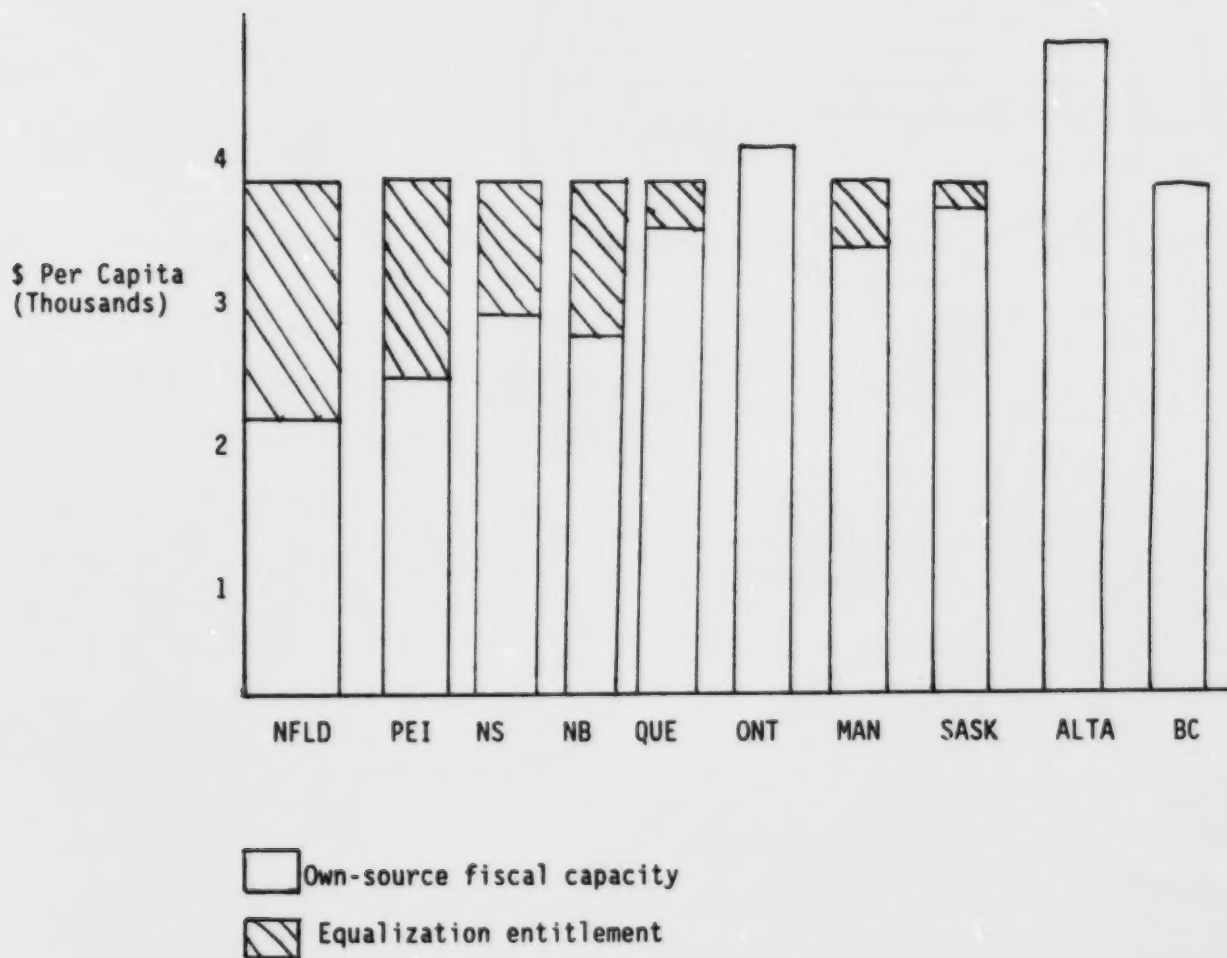
In the early to mid 1980s, transfers to firms were substantially increased by subsidies and grants relating to the National Energy Policy and so-called PIP grants. Expenditures under ACOA are now included in this category.

d. The Magnitude of Transfers

For 1987-88, transfers from the federal government to the government of Nova Scotia amounted to 38 percent of total gross general revenue. For Newfoundland this same figure was 46 percent, for Prince Edward Island it was 46 percent, and for New Brunswick it was 43 percent. Obviously, such transfers are vital to the fiscal capacities of governments in the Atlantic region. In total, the federal government transferred in excess of \$4 billion to governments in the region. Transfers to all provinces amounted to 18 percent of federal expenditures for 1987. Such transfers dwarf other forms of federal expenditure in the region. For example, ACOA was budgeted for just over \$300 million for the entire Atlantic region in 1989-90, or about 8% of transfer payments.

Chart #1

Fiscal Capacity 1987-88



Source: Federal-Provincial Fiscal Relations and Social Policy Division,
Department of Finance, Government of Canada.

Tables 4-7 give specific figures on transfers from the federal government to a) the Province, b) persons and c) businesses. Table 4 provides data on three programs for 1987-88 by province along with data on own-source fiscal capacities. On a per capita basis, own-source fiscal capacities vary significantly from province to province. For example, Newfoundland's own-source fiscal capacity is 60% of the national average while Alberta's is 146%. Nova Scotia's own source fiscal capacity, the highest in the Atlantic region, is 76% of the national average. Table 5 shows that equalization payments dominate the federal transfers to Nova Scotia, but EPF and CAP transfers are sizeable. In 1991-92, total cash transfers amount to \$1.496 billion, or \$1938 per person. In terms of fiscal capacity, Nova Scotia without transfers is at 76% of the national average but fiscal capacity with transfers added in is at 93%.

Table 6 shows data up to 1987 on transfers to persons. In 1987 they totalled \$1.599 billion, dominated by Old Age Security, Canada Pension Plan and Unemployment Insurance. Table 7 shows the relatively low level of federal transfers to businesses, including regional development incentives, especially since the demise of oil compensation payments under the National Energy Program.

2. The Economic Case for Maintaining Transfer Payments to Governments

The economic case for intergovernmental transfers in any federal system rests on three distinct concepts: the fiscal gap; fiscal equity; and fiscal efficiency.² In Canada, the fiscal gap has long been discounted as a basis for transfers. The existence of a fiscal gap presupposes an imbalance between expenditure responsibilities and tax powers sufficient to finance those responsibilities. In Canada, the provinces have wide ranging tax powers and, in fact, co-occupy most tax fields with the federal government. Rather the issue is the division of tax room in co-occupied tax fields between the federal government and the provinces. The evolution of federal-provincial fiscal relations in Canada has resulted in the federal government pre-empting sufficient share of the available tax room to enable it to undertake its constitutional obligations. Indeed, the inclusion of the Charter in the Constitution Act (1982) can be interpreted as strengthening the federal government's constitutional obligations, especially the case for transfers to the provinces which promote both fiscal equity and fiscal efficiency.

² The "fiscal gap" is a measure of the difference between the cost of providing for the services for which a jurisdiction is responsible and the revenue available to a jurisdiction. "Fiscal equity" can be defined as treating equal persons equally from a tax perspective, no matter where they live. "Fiscal efficiency" can be defined as a situation where the tax and expenditure system by itself does not give rise to uneconomic incentives to move to another province.

Table 4

Data on Fiscal Capacity by Province
1987-88

(\$ per capita)

Province	Own-Source	Equalization	EPF Cash	CAP
Nfld.	2277.16	1419.50	393.50	155.60
P.E.I.	2415.19	1281.50	393.50	170.70
N.S.	2861.92	834.70	393.50	146.00
N.B.	2681.70	1014.90	393.50	213.90
Que.	3219.00	477.60	393.50	239.80
Ont.	4078.60	-	335.10	142.50
Man.	3022.73	673.90	393.50	152.20
Sask.	3402.10	294.50	393.50	154.70
Alta.	5485.09	-	392.50	186.30
B.C.	3914.08	-	401.60	223.20

Source: Federal-Provincial Fiscal Relations and Social Policy Division, Department of Finance, Government of Canada.

Table 5
Federal Transfers to Provinces
Nova Scotia
1980-81-1991-92

	(Millions of Dollars)			(Dollars)	
	Equalization	EPF Cash	CAP	Total Cash	Cash Per Capita
1980-81	469	207	61	736	976
1981-82	528	228	71	827	1095
1982-83	574	259	87	920	1222
1983-84	605	295	93	993	1306
1984-85	620	312	105	1037	1362
1985-86	596	331	105	1032	1362
1986-87	620	343	124	1087	1439
1987-88	733	346	128	1207	1588
1988-89	833	353	154	1340	1745
1989-90	898	358	157	1413	1842
1990-91	937	342	189	1468	1913
1991-92	970	331	194	1496	1938

Source: Federal-Provincial Fiscal Relations and Social Policy Division, Department of Finance, Government of Canada.

Notes: Equalization = Fiscal Equalization Transfer

EPF Cash = Cash Component of EPF Transfer

Total cash excludes value of tax transfer. Tax transfer captured in own-source revenues and equalization.

Table 6

Federal Transfers to Persons
Nova Scotia
1980-1987

(Millions of Dollars)

	FA	U.I.	O.A.S.	C.P.P.	ALL
1980	67	208	303	101	778
1981	72	233	355	123	886
1982	79	347	403	151	1086
1983	82	397	438	182	1225
1984	86	413	472	209	1322
1985	89	454	520	238	1442
1986	89	484	557	267	1520
1987	89	495	586	349	1599

FA = Family Allowance OAS = Old Age Security ALL = All Programs

UI = Unemployment Insurance CPP = Canada Pension Plan

Source: Statistics Canada, Provincial Economic Accounts.

Table 7

**Federal Transfers to Business and
Regional Development Incentives to Province**

Nova Scotia
(1980-1987)

(Millions of Dollars)

	Subsidies*	Capital Assistance**	Regional Development Incentives
1980	857	39	42
1981	807	29	47
1982	392	191	48
1983	224	455	47
1984	243	564	46
1985	195	284	28
1986	106	206	24
1987	121	45	19

* Includes compensation paid to oil importers under NEP.

** Includes petroleum incentives programs payments.

Source: Statistics Canada, Provincial Economic Accounts.

The attainment of economic efficiency amounts to maximizing the size of the "economic pie" given society's constraints in terms of available resources - labour, physical capital, natural resources - and technology. In a regional economy, this amounts to ensuring that the available resources are allocated across regions as well as alternative activities in such a way that GNP could not be increased through any reallocation. Attaining an efficient allocation across regions/provinces of society's resources is precisely what is meant by maximizing the surplus from confederation - exploiting all possible gains from trade to be had from the economic union.

Within an economic union, services and free mobility of factors requires harmonization of the net impact of government on individuals' well-being if the surplus from the economic union is to be maximized. That is, the activities of provincial governments can have potentially significant implications for the attainment of an efficient allocation of mobile factors, especially labour, within the economic union. This is discussed in more detail in Section D below.

In the literature on fiscal federalism, there has been a particular focus on the implications of differential net fiscal benefits across provinces. The term "net fiscal benefits (NFBs)" refers to the difference between the benefits received by individuals from the output of the public sector and the taxes that they pay. The budgetary actions of provincial governments can result in differences in NFBs across provinces on two counts. First, provinces have differential access to resource royalties as a means of financing their public sectors. This permits resource rich provinces to provide a given level of public services at a lower price to residents than in resource poor provinces. Second, in the presence of income disparities across provinces as measured by per capita income, residents of "poor" provinces must pay more in taxes for a given level of public services than their counterparts in "rich" provinces. In either case (and both are characteristics of the Canadian economy), the budgetary actions of provincial governments result in horizontal inequity within the federation - individuals who would otherwise be equal in terms of their well-being are treated differently in the presence of provincial budgetary actions. If horizontal equity within the economic union is accepted as a goal, then differences in NFBs across provinces should be eliminated through the establishment of an appropriate set of transfers.

Fiscal inequity may also give rise to migration within the economic union. There is an incentive to move to provinces with relatively high levels of net fiscal benefits, which has implications for the efficient allocation of labour within the economic union. Migration that is in response to productivity differences reflected in wage differences is clearly desirable within the economic union. Such migration must be seen as improving the allocation of labour and raising the level of GNP. However, migration that is solely fiscally induced can result in labour that is well allocated (in a productivity sense) leaving the region. By the same token, it may prove difficult for regions with relatively low levels of net fiscal benefits to attract labour that would be better allocated (again in a productivity sense) there than in its present use. This, of course, has serious implications for the success of any provincial economic development strategy.

These ideas have been eloquently stated in the writings of Professor John F. Graham:

The principle of fiscal equity is based ... upon - indeed is an extension of - the widely accepted principle of horizontal equity, i.e., of equal treatment of equals ... the rationale for applying this principle is twofold. First, since the fiscal capacity (tax base) of province will inevitably vary because of differences in resource base, location, occupational mix, etc., equalizing fiscal transfers are necessary to eliminate differential fiscal pressures which otherwise would encourage the movement of well allocated resources from low- to high-income provinces and localities and impede the movement of resources from high- to low- income provinces where they would be more productively allocated. This is the economic argument.

Second, if citizens are, by and large, to distribute themselves most productively in a nationally integrated economy, their fiscal treatment should not be dependent upon the fiscal capacity of the province or municipality in which they happen to be located. This is an ethical argument the affirmation of which by all provinces and citizens helps to bind the country together and provide a basis for national unity.

John F. Graham, "Equalization and Canadian Federalism," Public Finance, 1982.

The Atlantic Provinces provide a useful illustration. Differences in marginal productivity probably call for continued net emigration of some labour and capital. But the withholding of federal transfers from the Atlantic Provinces in order to accelerate the movement of labour and capital from that region would not be economically sound, for it would encourage not only the desirable movements of factors whose productivity is relatively low there, but also the undesirable movement of factors whose productivity compares favourably with what it would be in other parts of the country. It would also discourage the desirable inward movement from other parts of the country of factors whose productivity would be greater in Atlantic Canada.

John F. Graham, "Fiscal Adjustment in a Federal Country", in Intergovernmental Fiscal Relations, Canadian Tax Foundation, 1964.

Fiscal equity and efficiency therefore require equalization of provincial fiscal capacities and this was the conclusion of the Economic Council of Canada in its excellent and influential study entitled Financing Confederation: Today and Tomorrow (Ottawa: Supply and Services, 1982).³ The equity aspects of equalization are discussed more fully in Section B below.

3. The Case for Maintaining the Federal Spending Power

Transfers that are intended solely to equalize fiscal capacities should be made unconditionally. The federal government has traditionally used its spending power to influence provincial expenditure decisions through the use of various forms of conditional grant. This is justifiable where it can be shown that provincial expenditure decisions confer external benefits or costs on residents of other provinces. It is also justifiable where it can be shown that the functioning of the economic union will be impeded in the absence of standardization in the availability and provision of particular services. Each of these arguments has some pertinence in the cases of both health care and education. The latter argument provides a basis for block funding programs such as EPF. However, matching grants rather than block funding are appropriate in the face of interprovincial externalities.

It needs to be recognized that notwithstanding the conditional nature of EPF and CAP transfers and the specific objectives of these programs, transfers that in practice amount to approximately equal per capita grants are, in effect, fully equalized transfers. Moreover, CAP type transfers, to some extent, respond to differences in need and/or cost of provision across provinces, again contributing to the broad principle of equalization.

Finally, the spending power is itself an instrument through which the federal government can pursue redistributive objectives. Thus, for example, federal involvement in financing provincial social assistance expenditures through CAP can be justified.

4. Fiscal Equalization and Regional Disparity

The goal of equalized NFBs across provinces has as its basis the attainment of horizontal equity and efficiency. The attainment of an efficient allocation of labour across provinces is central to the notion of maximizing the surplus from the economic union. Equalizing fiscal capacities across provinces would do nothing more than put provincial governments on an equal footing in terms of financing their activities. **Reducing regional**

³ A distinction needs to be made between what the Council termed the "narrow-based" and "broad-based" views of horizontal equity. On grounds of "narrow-based" equity, they argue that federal policies should not seek to undo redistributive policies of provincial governments. Rather they should seek only to ensure that their own policies are horizontally equitable. On grounds of "broad-based" equity, however, the federal government should seek to neutralize horizontal inequities arising from provincial budgetary actions as well. They recommend that in areas where provincial property rights are constitutionally assigned, such as is the case with resource rents, the narrow-based view should apply. Where this is not the case, broad-based equity principles should be adhered to. Hence they recommend a hybrid approach: equalization of that portion of resource rents which would accrue to the federal treasury if NFBs were included in the income tax base and full equalization of other provincial revenues. The treatment of resource rents in the equalization formula remains a controversial aspect of the program. This, including the equalization provisions of the Canada-Nova Scotia Offshore agreement, should be an important issue for the Province in its negotiations with the federal government.

disparity requires more than this; additional monies to, as it were, give the less developed regions a "leg up" in terms of economic development expenditures.⁴

4.1 The "Dependency" Argument

It has been argued that transfers from the federal government reduce the economic incentive for have-not provinces to promote wealth generating activities, on the grounds that increased provincial tax revenue will be partially offset by reduced equalization payments. At most, this is an argument for a change in the equalization formula to allow provinces to retain more of the gains from growth, and in an ad hoc fashion this has been recognized in the agreements between Ottawa on the one hand and Newfoundland and Nova Scotia on the other relating to offshore oil revenues. However, Nova Scotia should reject the transfer dependency argument for equalization payments and stress their bases in equity and efficiency arguments.

In thinking about "dependency" one has to emphasize the distinction between transfers to individuals, industrial assistance to particular firms and federal government transfers to provinces. "Bailing out" particular firms may create attitudes of "dependency" in the private sector, but this problem is a Canada-wide one. (Although we have Sydney Steel, Ontario has DeHavilland, and Quebec has the Davie shipyards). Transfers to individuals can also create attitudes of "dependency" (some people point to UI payments as an example), but some transfers to individuals clearly do not create such attitudes (e.g., pensions).

Transfers to provincial governments are entirely different. Transfers to provincial governments increase their ability to deliver a given level of services at lower tax rates, in exactly the same way as revenues from natural resource extraction - but there is no evidence that oil revenues paid to the Alberta government or federal government transfers paid to the province of Nova Scotia have affected the willingness to work, to save or to invest of the individual firms and citizens of Alberta or Nova Scotia.

Another area of controversy related to equalization payments relates to whether they should be paid to provincial governments or directly to individuals. In principle, efficiency and equity objectives could be achieved through transfers to individuals rather than provinces through, for example, a federal income tax system biased in favour of residents of "have-not" provinces. However, the issue of providing equalization payments to persons rather than to governments raises a host of conceptual, empirical and administrative complexities well beyond the capacity of the Advisory Committee to resolve in the time available. At a minimum, the Province should not agree to any change in the basis of equalization payments that would result in it being a net loser.

⁴ Shaping Canada's Future Together in its proposals related to section 121 of the Constitution makes reference to "the principles of equalization or regional development". It is not clear why these concepts are juxtaposed in this way, since as noted they are not substitutes for one another. In particular, equalization payments are not barriers to an efficient economic union.

An argument that may arise in support of transfers to persons rather than transfers to governments is that the latter induce wastage owing to a lack of accountability. However, transfers to provincial governments are not a new feature of the Canadian system, for they go back to 1867 and in the 1920's were as important in relative terms as they are today. The notion that they are a recent aberration in the system must be rejected.

D. SOCIAL POLICY AND NATIONAL STANDARDS

1. National Standards in Practice

National programmes (like the Canada Pension Plan) necessarily contain national standards, but the more problematic issue is the imposition of national standards in provincially administered government services.⁵ In some countries, (e.g., the U.S., where 94% of federal grants to the states are conditional on the states fulfilling detailed performance requirements), federal legislation imposes very specific requirements on the states' administration of cost-shared programs. In Canada, "national standards" in the delivery of provincially administered programmes are relatively few and fairly imprecise. Although transfers to provincial governments now comprise about one quarter of federal program expenditures, most of these transfers occur through unconditional grants, such as equalization, or through block grants, such as Established Programs Financing. Even where program costs are shared between provincial and federal levels of government, as in the Canada Assistance Plan, program requirements for such transfers are extremely general.

The clear philosophy underlying Canadian inter-governmental financial transfers is the transfer of financial resources and administrative responsibilities for program delivery to provinces, without a supervisory federal role. The Canada Health Act represents an exception to this philosophy, since it specifies five criteria comprising "national standards" in health care insurance [comprehensiveness, universality, accessibility, portability and public administration] and a series of penalties if user fees are introduced. As Hunsley puts it "with the exception of medicare, one would be hard put to find clear national standards in any single piece of federal cost-sharing legislation."⁶ As he points out, the Canada Assistance Plan pays 50% of the cost of provincial social assistance but it sets out very few standards, e.g., an appeal process for applicants who are refused financial assistance must exist and provincial residency requirements for eligibility for social assistance are prohibited. Although provinces are required to define in law a level of "need" and to provide programs which meet that need, and provinces are required to submit applicants for assistance to a needs test, there is no restriction on how high or low the standard of need is set. Nor is there any restriction on provincial control of eligibility.

⁵ Although some system of financing is clearly required for any set of social services, this section's focus is the impact of national standards in programme delivery. The issue of interprovincial variation in tax regimes or fiscal capacity is considered in section C. Clearly, however, some equalization of fiscal capacity is a prerequisite for national standards in provincial programme delivery.

⁶ T. Hunsley, "Constitutional Change and National Social Programs", in Canada: The State of the Federation, 1991, ed. Douglas M. Brown (Kingston, Ont.: Queen's University, Institute of Intergovernmental Relations, 1991), p. 115.

In fact, there are very significant differences in both administrative practices and benefit levels for social assistance recipients across Canadian provinces. In 1989, a single employable recipient in New Brunswick, for example, would receive \$2,904 per year, compared to \$6,804 in Ontario. A couple with two children on social assistance would receive \$11,950 in Halifax, \$8,500 in New Brunswick and \$16,548 per year in Ontario. (In addition, federal benefits under family allowances, the child tax credit and the refundable federal sales tax credit for the four-person family would total \$2,242 per annum.)⁷

Since the consolidation of post-secondary education and health care insurance into the Established Programs Financing (EPF) block grant in 1977 there have been no specific performance requirements whatsoever on the expenditures made by provincial governments with the funds ostensibly labelled for post-secondary education.

2. The Case for National Standards

The economic argument for national standards is based on the idea that national standards increase both the efficiency and the equity of our economic union. Although full equalization of the fiscal capacity of provinces would imply that on average differences in personal net income between provinces reflect only differences in productivity, no real-world individual cares about differences in average taxes or average services. What each of us actually cares about is the particular taxes and government services that we personally are likely to pay and to consume. In considering whether to take a job elsewhere, with higher pay, the parents of school-age children are interested in whether schools will be of comparable quality. People with health problems want to know if they can expect a comparable quality of medical care, if they move. And those whose income prospects are uncertain will be more likely to move to a better job elsewhere if the safety net of social assistance offers a comparable level of security, should things not turn out as well as hoped. In all these cases, the efficiency of the Canadian economic union will be increased if people pay primary attention to the pay and prospects of the jobs they could get in the origin and destination provinces -- but it is rational for people also to pay close attention to any differences in the public services which are particularly important in their specific circumstances.

Equalization payments to poorer provinces are not, therefore, enough to guarantee an efficient national labour market, undistorted by differences in the net fiscal benefits obtainable from government. **In addition to equal average net fiscal benefits, an efficient national labour market requires comparability in the major public services which are particularly important to major segments of the population. -- i.e. national standards.**

National standards are also important for "equity", in all its senses. By "horizontal equity" in taxation and spending, economists usually mean the principle that individuals in like circumstances should be treated alike, by the spending and taxation decisions of government -- for much the same reason that section 15 (1) of the Charter of Rights

⁷ National Council of Welfare, Welfare Incomes 1990, Ottawa: Department of Supply and Services, 1991.

assigns to individuals the right to "the equal protection and equal benefit of the law without discrimination". However, without national standards, like people in different provinces will necessarily not be treated alike, to the degree that the quality of the services they receive diverge. The concept of "vertical equity" refers to the degree of equality in the distribution of income, among the current members of society. National standards serve to ensure comparable services across the country for all poor people, hence vertical equity is particularly important for provinces with a relatively high rate of poverty such as Nova Scotia. A third dimension of "equity" is the ideal of "equality of opportunity" for the members of each new generation, and of all these dimensions of equity, equality of opportunity is the clearest. If we accept that education, health care and minimally adequate food, clothing and shelter while young are important determinants of an individual's future life chances, then it is clear that national standards in education, health and social assistance are necessary prerequisites for equality of opportunity on a national scale. If provincial programs diverge substantially, in either accessibility or quality of services, then the probability of a deprived childhood will inevitably vary by provincial jurisdiction. Canada's social programs do not now produce equality of opportunity, but to the extent that national standards in such programs exist, they do at least mitigate to some degree the inequality of opportunity between provinces.

Although many discussions of economic policy emphasize "efficiency" issues, with only a slight glance at "equity", such an emphasis is much less defensible when we are concerned with constitutional issues. The issue we are concerned with in Canada today is the continued maintenance of our common polity. A continued perception of economic equity is central to the continued cohesion of a nation state, as well as to the acceptance and effective implementation of many of its policies. **The relationship between economic equity and political boundaries is therefore reciprocal. The political boundaries of the nation state serve to define the set of individuals among whom equity comparisons are made and perceived grievances about economic inequity create social strains which can undermine the continued cohesion of the nation state. Economic equity is therefore central to the constitutional debate.**

For the past 20 years, the impacts of our lack of national standards in social assistance have been offset by the presence of the U.I. programme, which is most generous in the provinces where social assistance is least generous. However, as the federal government increasingly disengages itself from the income maintenance role of unemployment insurance, existing differentials in provincial social assistance levels will become relatively more important. Canada's lack of national standards in social assistance administration and benefits will become increasingly apparent. If there continues to be free mobility of people between provincial jurisdictions, one can expect to observe increasing concern, as in the U.S., with the impact of social assistance differentials on inter-provincial migration.

If our existing national standards in health insurance begin to erode, one can also expect significant impacts on migration. Those who live in provinces with better coverage will become more reluctant to leave, while those who are not covered in their home provinces will be attracted to more generous provinces -- and the more serious the ailment, the more important it will be to live in a province where that ailment is covered. Cash-

strapped provincial governments are always tempted to reduce costs by reducing health care coverage, and will be increasingly tempted if they have to worry about the inflows of patients from neighbouring jurisdictions which will occur if they are relatively generous in coverage. Expansion of private sector health insurance plans will partially meet the public demand for security from health care costs -- but at the cost of moving our system closer to the U.S. model, where the competing health insurance bureaucracies have created a system which spends an additional 2.1% of GDP more than Canada does on health care costs -- i.e., the equivalent of \$14.4 Billion (Cdn.) per year.

The general point is that since the sick and the poor require costly services and scarce cash, cost minimizing government would like to offload these financial liabilities on neighbouring jurisdictions. Since one can expect some people to respond to economic incentives to inter-provincial migration, the social policy and health care insurance decisions of each jurisdiction have "externalities" for other jurisdictions, by luring or repelling inter-provincial migration flows. In both cases, in the absence of national standards, provincial governments have both the incentive and the means to follow "beggar thy neighbour" policies. If they do so, both equity and efficiency will suffer.

In assessing whether national standards are required in a particular policy area or whether standard setting should be completely devolved to the provincial level, one needs to ask whether incentives exist that would cause the cumulative decisions of provinces to converge or to diverge and what the costs of a divergence would be. The Canada Health Act and Canada Assistance Plan are examples of policy areas where provincial decision-makers, at the margin, face incentives to decrease provincial standards, at a rate which will differ across provinces. Part of the costs of such decisions can be exported to neighbouring jurisdictions (as people leave, for better health care or more generous social assistance elsewhere), but the most important costs are the diminished general efficiency of the Canadian labour market and the greater overall inequity of Canadian society. Education, on the other hand, is an example of a policy area where provincial decision-makers have, in practice, incentives to harmonize, hence the potential costs of policy divergence are of less relevance.

The key point is that where "national standards" refer to standards in programme entitlement, delivered to the residents of particular jurisdictions, budgetary pressures create incentives to decision makers to cut costs by cutting entitlements. The impacts of such decisions on inter-provincial migration implies a less efficient labour market and the transferral of costs to more generous jurisdictions. However, where "standards" refer to the labelling of individuals' characteristics (as in education) there may be many pressures for voluntary harmonization. The case for and against national standards depends in part on what type of standard is at issue.

3. Why do we care about "National Standards"?

Although national standards in health care insurance are written into the Canada Health Act, national standards in social policy are minimal elsewhere. However, this fact surprises most Canadians. Many relatively well-informed people think that national standards exist in Canadian social policy -- indeed the possible erosion of "national

standards" became an emotive issue during the debates over the Meech Lake Accord and, earlier, the FTA.

If we have so little by way of national standards in Canada, why do we care so much about them? The benefits of national standards -- greater equity, a more efficient national labour market, a larger pool of vacancies in destination provinces, etc. -- are, after all, "public goods" which are received by all Canadians but which (at least according to economic theory) everyone would prefer to have paid for by "someone else". In our view, national standards are politically important because the idea of national standards performs a political function within the Canadian federation which is far more important to most individuals than its economic function. National standards, at bottom, ensure that the relationship of the citizen to the state is roughly comparable across the nation, thereby implicitly defining, in practical terms, the meaning of national citizenship.

4. How can National Standards be Implemented?

One way of creating national standards is by instituting national programs. As the example of unemployment insurance indicates, it is possible, even within nationally administered programs, to build in program features which attempt to recognize the differences in economic environment which individuals in different areas of the country face. However, in nationally administered programs it is difficult to build in the degree of flexibility and experimentation which is inherent in provincial delivery of programs. On the other hand, provincial delivery of social programs purchases the advantages of provincial flexibility and inter-provincial experimentation at the cost of the possible emergence of substantial inequities across provinces in program benefits, and substantial efficiency losses for the national labour market.

One possible solution for the problem of how to maintain national standards while preserving provincial diversity is to entrench national standards in the constitution as part of a "Social Charter" which specifies that all Canadians have a right to adequate food, clothing, shelter, medical care and education. If the Social Charter were accompanied by an effective mechanism for enforcement, the arguments between federal and provincial governments for jurisdictional control over social policy would no longer have the potential to diminish the equity and efficiency of the Canadian economic union. The argument for the inclusion of a Charter of Social Rights in the constitution is, in one sense, an argument for a "results oriented" approach. It matters much less to individuals whether social or health care programs are delivered by federal or by provincial employees, than, if, at the end of the day, they do not have adequate food, clothing, shelter, medical care or education.

If a Charter of Social Rights were incorporated into the constitution, one could expect the values expressed by the language of the charter to influence the public debate on social policy in Canada in the long run, in the same way that the language of the U.N.'s Universal Declaration of Human Rights has often been appealed to around the world. However, a social charter must also have an enforcement mechanism if it is to be credible, and there are a number of possible models.

Social rights could be entrenched into the constitution in the same way that the existing Charter of Rights and Freedoms entrenches political and legal rights. If so, such rights would become fully justiciable through the court system, and judges could end up making a large number of the detailed social policy decisions which are inescapable in a changing society. However, the legal process can take a long time, can be extremely expensive and can produce surprising conclusions. Full justiciability of social rights has the potential to increase the level of litigiousness in Canadian society and to create a social policy system which is the result of a series of case by case decisions, rather than the product of an overall system design.

An alternative to the courts is the European model of a Social Charter, which relies on expert fact finding to reveal the infringement of rights and mobilize public opinion to find solutions. However, those disenchanted with the political process worry that the infringement of social rights may simply be ignored. Others emphasize that "expert opinion" is fallible. Although the drafters of social policy legislation and the administrators of social programmes may try to anticipate all the "special cases" which bedevil social policy, they are unlikely to be completely successful.

The fundamental problem is that some people always "slip through the cracks" of the social policy system, but if administrative powers are devolved to the provinces while social and economic change continues to accelerate, this will happen at an increasing rate, unevenly across provinces. Defenders of the parliamentary tradition in Canadian political life tend to argue that even if this is the case, responsibility for social policy decisions should ultimately remain in political hands. But the more sceptical note that the political mechanism is responsive to the more articulate, the more numerous and the more photogenic -- not necessarily to the more disadvantaged, and one of the great virtues of the judicial system is the dispassionate hearing it can afford to individual grievances.

One possible solution to the deficiencies of the court and political systems would be to combine aspects of the administrative/political and the juridical mechanisms for the enforcement of social and economic rights. One could frame the rights of Canadians as the right to expect that their community adopt a set of policies that produce adequate food, clothing, shelter, health care and education for all citizens. The constitution might, for example, require the provinces to develop policies to ensure that all citizens have adequate food, clothing, shelter, education and medical care. If the right of an individual is the right to an effective policy then (a) such policies may legitimately differ in different environments (e.g. in Quebec or in native communities) as long as the end result within each community is that all receive adequate food, clothing, shelter, health care and education; (b) the role of the courts is limited to a finding of fact, whether or not existing policies are effective or ineffective in meeting the stated constitutional goals of providing adequate food, clothing, shelter, health care and education to all Canadians.⁸ In this way,

⁸ This implies that a Social Charter has no specific ideological implications. "Right-wing" and "left-wing" Canadians can generally agree on values -- e.g. that it would be morally wrong to let people freeze to death in the streets. Where they disagree is on policy -- i.e., the appropriate role of markets and of government. If it really is the case that an unhindered market mechanism would adequately provide primary commodities such as housing to all individuals, then a provincial government could follow an economic policy of leaving it all to the market -- but individuals would have recourse to a dispassionate forum which would hear

individual grievances could be heard in a setting which carefully considers the evidence, but the responsibility for policy design would remain political.

Since there are a number of possible ways to implement a Social Charter, each with its own combination of advantages and disadvantages, the debate on the Social Charter raises complex issues. However, the importance of this debate is heightened by the fact that existing mechanisms for the creation and enforcement of national standards are unlikely to be effective for much longer. Enforcement of national standards in Medicare through the threat of withholding EPF cash transfers is already slated to disappear in about a decade. More fundamentally, there are significant pressures in the current constitutional round for greater decentralization of powers, and little guarantee that existing protections for national standards will be maintained.

Given the efficiency and equity advantages of national standards, and their political importance, it would seem to be undesirable for national standards to disappear. Indeed, if national standards in social and medical care programmes were to be eroded, relatively affluent provinces could expect to be adversely affected by increased net immigration from the poorer provinces. Since the rationale to justify rich provinces continuing to pay into the equalization transfer system is the maintenance of such standards, one would have to expect that the erosion of national standards would imply erosion of the political will to continue making equalization payments. If this were to happen, Nova Scotia would be a big loser. However, some form of "Social Charter" seems, at present, the only effective way to ensure that this does not happen.

contentions that such policies had not been effective.

PART II. OTHER IMPORTANT CONSTITUTIONAL ISSUES

Part II consists of a brief discussion of a number of issues considered by the Committee, with comments on the recent Federal proposals as appropriate. The issues are raised in no particular sequence.

1) Economic Development of Maritime Provinces Most issues relevant to development in the Maritimes are also national issues -- i.e. the economic union, transfer payments and the division of powers. This implies that the Advisory Committee does not favour an autarkic or go-it-alone strategy for Nova Scotia. Possibilities for economic development will be affected by the major choices resulting from the constitutional debate on key issues relating to centralization vs decentralization, equalization payments and the division of powers. Also relevant is that "regional development" may emerge as an agenda item, the responsibility for which may be transferred to the provinces. Part of the motivation for this may rest with the view common in some parts of the country that "regional development" is a synonym for large scale hand-outs to dubious industrial projects. Part of the motivation may be purely semantic: Allaire, for example, allocates regional development to provinces but retains a key role for a (revised) equalization program funded by the Federal government to "equalize infrastructure" in some sense. **Nova Scotia's interests are to emphasize the continuing importance of regional development, properly conceived, to argue for equalization programmes along current lines, and to retain the language of Section 36 which requires both levels of government to "further economic development to reduce disparity in opportunities".** The economic benefits from closer Maritime or Atlantic Provinces cooperation are judged to be relatively small, but the political benefits of closer harmonization may be substantial.

2) Division of Powers Opinion is divided as to whether a general reallocation of powers towards decentralization is desirable, but most economists are concerned that increased decentralization may impede the federal governments ability to pursue efficiency, equity and stabilization goals. Courchene is a high profile exponent of increased decentralization, however. By international standards, Canada is already among the most decentralized federations among industrial countries. At some point, decentralization will rend the national political sense by reducing the federal government's ability to effect transfers among provinces, whether such decentralization is motivated by a desire to increase provincial government powers at the expense of federal powers, or by a desire to reduce the overall size of government. Recent discussion emphasizes a major conundrum: how to simultaneously a) recognize symbolically and substantively a distinct society status for Quebec, b) treat all provinces equally and c) maintain a strong central government for national efficiency objectives and desired redistributive activity. Any two of these can be achieved in principle, but to square all three of them raises major difficulties.

Specific discussion on reallocation to provinces has related to culture and language, labour market policies, social policies and regional development. Education, communications and environment are discussed as areas of joint jurisdiction. In general, redistribution of powers to smaller provinces may involve more costs and risks than benefits, but some redistribution is probable. In general terms, reallocation of powers only

makes sense if there is some net gain to the system as a whole, and, in Nova Scotia's terms, to the Province. It is a mistake to confuse policy mistakes resulting within a given structure with policy mistakes that are caused by a flawed structure, since provinces may be no better than the federal government in implementing successful policies in any reassigned areas of responsibility. **Given that new financial resources are unlikely to accompany new constitutional responsibilities, Nova Scotia's interest lies in reducing explicit transfers of powers to provinces.** The province may have an interest in promoting joint jurisdiction in education, the environment and fisheries. In current terminology, joint jurisdiction is discussed in terms of either concurrent jurisdiction with federal paramountcy (i.e. federal law prevails if federal and provincial laws differ) or concurrent jurisdiction with provincial paramountcy. Education, for example, might entail provincial paramountcy. However, the contentious nature of these issues, especially education, suggests strongly that they should be kept off the agenda.

3) Transportation Transportation jurisdiction is a complex patchwork, with differences among automobiles, bus and rail modes. For example, automobiles must adhere to federal safety and emission standards until sold; they then come under provincial jurisdiction. While a purist position on division of powers might suggest disentangling the regulations, this is not really useful since the patchwork works, by and large. Constitutional change is in any event not the solution. A possible exception is national highways, where recognition that they are a shared jurisdiction might be helpful. **Transportation issues are thus not a key constitutional question, but if federal involvement in national highways is brought forward, Nova Scotia should agree.**

4) Spending Power The federal power to tax can lead to problems of intrusion on provincial spending areas, especially with conditional shared cost programs. Pre 1982, the spending power of the federal government was assumed to exist by way of a) the power to tax gives the power to spend, b) the public property clause or c) the Peace, Order and Good Government clause. Provisions of 1982 Constitution Act (Section 36) may strengthen spending power. Meech Lake would have recognized the principle of compensation to a province opting out of a new program but providing a compatible provincial program. **Given the fiscal position of the province and the need for maintenance of national standards in several key areas, Nova Scotia's best position is one that would strengthen the federal spending power, with retention of the current vagueness a second choice.** A third but inferior option would be to accept an explicit statement relating to spending power which reduces the federal governments initiatives in introducing new programmes (as in Meech Lake) or which constrains federal spending initiatives more broadly (as in Allaire). Allaire and the Group of 22 would put limits on spending power, assuming water-tight compartments in federal-provincial spending which do not exist, and limiting the federal ability to promote equity among Canadians.

5) Resource Sectors In many resource sectors (agricultural supply management systems, sharing of resource rents, some water and environmental issues) negotiation is more important than constitutional arrangements. For example, interdelegation was used to create "national agencies" under 1972 Farm Products Marketing Agencies Act. In other areas, constitutional revision has been critical (i.e. the addition of clause 92A in 1982 relating to taxation and the division of powers with respect to certain natural resources).

A number of constitutional issues relating to resources could conceivably arise in the negotiations, including the thorny issue of the sharing of resource rents. **Despite their importance, Nova Scotia's general strategy ought to be to resist raising them, either because they are not important enough to raise at this time or because they raise issues that are too sensitive to raise at this time.** An example of the former would be the apparent incentive given by section 125 to the creation of provincial crown corporations to protect provincial resource rents from federal taxation. Examples of the latter include delineation of provincial boundaries in coastal areas, and treaty making powers. Fisheries may be an exception, where Nova Scotia has a clear interest in supporting federal jurisdiction in order to capitalize on its large mobile fleets. This issue failed to be resolved in earlier negotiations because of conflicting provincial interests, but Nova Scotia should recognize the potential serious implications of loss of federal jurisdiction in this area and push for a common position with New Brunswick and P.E.I.

6) Trade Policy Trade policy was discussed in the context of whether bargaining power is a function of country size, and whether FTA would include a separated Quebec. Country size is critical in military confrontation, less so in economic and diplomatic bargaining. Large nations can provide more benefits to others -- and can therefore deny more benefits, giving some advantage. On balance, a divided Canada would lose some bargaining strength. Whether Quebec would be included in the FTA if it is sovereign depends in part on nature of the separation process. On economic grounds it is not clear why it would be in Canada's interest to keep Quebec out of the FTA. Politically, the U.S. would be in an awkward position denying Quebec access to the FTA. On current thinking, Quebec would wish to be in the FTA. Courchene's argument that the FTA would apply more strictly to Quebec as a country than Quebec as a province, in such areas as government procurement and financial institution ownership rules, may be valid but not sufficient to outweigh Quebec interest in the FTA. Hard feelings on separation could alter the situation. **Constitutionally, few issues are raised by trade policy issues, and, other things being equal, Nova Scotia's position is to support the status quo regarding the composition of Canada. This is not to deny that Nova Scotia has an interest in promoting a provincial view with respect to trade policy, but that does not require a constitutional change.**

7) Responsibility for Stabilization and Growth Monetary, fiscal and exchange rate policies are important levers of economic policy, but they raise no major constitutional issues. **It is unwise to alter the constitution because some people judge that current economic policy is in some sense unwise.** Disagreement on the appropriate policy response is inevitable. Constitutional change to limit spending or to reduce deficits or to regulate the growth of the money supply is not the solution. Questions relating to regional representation in decisions of the Bank of Canada are not of a constitutional nature. Regional representation could be enhanced, to little overall effect if U.S. experience relating to the Federal Reserve System is any guide. Regional representation that was required to reflect exclusively regional interests could impact on policy, but almost certainly in a negative manner by frustrating the development of any coherent national strategy. Nova Scotia's interests lie in the status quo. It is not in Nova Scotia's interest to tie the Bank of Canada to a policy of pursuing zero inflation, regardless of unemployment consequences.

8) Financial and Securities Regulation Canadian capital markets are organized for the purpose of uniting suppliers of capital such as individual investors, businesses, governments and trade unions with users of capital like individuals purchasing consumer goods or businesses expanding plant and acquiring equipment.

The function of financial intermediation is performed by the various types of businesses in the financial services industry. These include banks, trust and loan corporations, insurance firms, credit unions and mutual funds. These financial intermediaries invest funds with the assistance of securities dealers.

Historically the banks, trust and loan corporations, insurance firms and securities dealers were regarded as "four separate pillars" of the financial services industry. This resulted in regulation by institution with rules, for example, prohibiting or limiting cross ownership or control of institutions in another pillar. In 1987 these barriers and prohibitions began to collapse and they will continue to do so, leading to each regulator regulating more activities of a financial institution. These developments will result in the need for greater co-operation among regulators at all levels of government.

The primary objective of financial institution regulation is to protect individual depositors, beneficiaries and insured persons by monitoring the financial stability of each financial institution to ensure it complies with the applicable policies of the governing legislation and the detailed rules concerning capital adequacy, financial reserves and competency of personnel.

Currently the regulation of banks and banking is exclusively within federal jurisdiction under subsection 91(15) of the Constitution Act, 1967. The Federal Bank Act allows banks to carry on activities which relate to the business of banking, unless expressly prohibited by the Bank Act, and regulates the permitted activities.

Both the federal and provincial governments are involved in the regulations of trust and loan corporations, insurance firms and credit unions. The federal parliament and the Nova Scotia legislature both have proposed and enacted, respectively, within the last year, new legislation governing trust and loan corporations.

Although constitutional powers are not clearly divided in Canada regarding trust and loan corporations, insurance firms and credit unions and the overlap has the potential for multiple regulation, this has not been a practical problem in Nova Scotia to date. Accordingly, Nova Scotia should opt for the status quo on this issue and not seek specific changes in the constitutional division of powers relating to financial institutions.

Securities regulation in Canada has been a matter of provincial legislation since 1912 when Manitoba enacted its Sale of Shares legislation. Nova Scotia first enacted securities legislation over 60 years ago. The legislation was modelled upon the Ontario Security Frauds Prevention Act of 1928. Today securities dealers and securities markets continue to be regulated at the provincial level under the provincial power over property and civil rights in subsection 92(13) of the Constitution Act, 1867. The constitutional

basis of support for federal regulation of securities markets is found in the trade and commerce power in subsection 91(2) of the Constitution Act, 1867.

The objectives of provincial securities regulation are to protect investors in securities and to promote fair, efficient and effective capital markets. This is accomplished by ensuring that investors have available to them a reasonable level of information upon which to make informed investment decisions and by requiring participants in the securities industry to meet capital, competency and bonding requirements so that investors are fairly treated. The regulatory techniques are fourfold:

- (i) disclosure - Full, true, plain and continuous disclosure about issuers of securities is required so purchasers in both the primary and secondary markets can make rational decisions concerning investments.
- (ii) regulation of participants - Securities market professionals such as brokers, investment dealers, underwriters, advisers and their sales representatives are required to satisfy detailed licensing requirements to ensure integrity, both personal and financial, as well as competency in dealing with the investing public.
- (iii) regulation of market conduct - In addition to disclosure about issuers of securities and licensing of market professionals, provincial securities legislation includes specific provisions which sometimes prohibit certain conduct while at other times mandate the required conduct. An example of the former is the prohibition against purchasing or selling securities with price sensitive information that has not been generally made available to the investing public. The regulation of take-over bids to purchase issued securities illustrates the latter, and
- (iv) remedies - A variety of civil and quasi criminal remedies are included to deal with violations of securities laws and failures to act in the public interest. It should be noted that provincial securities legislation does not contain mechanisms for the resolution of private disputes between private litigants. Those matters are left to the judicial system. In most provinces, including Nova Scotia, securities legislation is administered by a separate regulatory tribunal, a securities commission.

Although provincial securities acts do differ somewhat in substance and detail, the provincial securities administrators, working together as the Canadian Securities Administrators group (CSA), which meets at least twice yearly, have reduced conflicts and obtained substantial harmonization. Since the late 1960's provincial administrators through CSA have produced almost fifty national policy statements which are applicable throughout Canada and cover most aspects of securities regulation. Today the provinces work together in the development of new policy initiatives of national and international significance and usually publish such initiatives in draft form for comments before adoption. It is important to note that these substantial efforts at harmonization of provincial securities laws have not precluded individual provinces from developing their own local policies and regulations specifically tailored to local objectives. An example of this in the Nova Scotia context is the regulations governing the Nova Scotia Stock Savings Plan tax credit programme.

A further example of provincial co-operation is reflected in the June 1991 agreement in principle by the Maritime Forum of Cabinets to the creation of a Maritime Provinces securities commission.

In short, provincial regulation of securities dealers and securities markets has worked reasonably well for a very long period of time and Canadian capital markets are not balkanized. **Accordingly it is not in the interest of Nova Scotia to eliminate the present system of provincial securities regulation or to agree to the creation of a federal securities authority.**

This is not to say that co-ordination of provincial regulatory efforts with those of the federal government will be unnecessary. Given the proposed changes in federal legislation governing the investment advisory powers and discretionary management authority of federal financial institutions, it will be important for both levels of government to consult and to co-ordinate their efforts in the future. However this does not mean the federal government should enter the field of securities regulation. To quote from Professor Courchene's 1991 paper on "Economic Dimensions of Constitutional Change, "... where are the gains to come from since the result will be duplication, entanglement, continuous court challenges and the like, given that the provinces would still retain aspects of this role." [i.e., securities regulation]

The federal constitutional proposals in "Shaping Canada's Future Together: Proposals" and "Canadian Federalism and Economic Union: Partnership for Prosperity", through the proposed new section 91A, appear to facilitate such an entry into securities regulation and, indeed, virtually any other area of economic activity. This should be of concern to provincial policy makers who may lose the ability to respond to economic matters of local importance only and face a much greater centralization of powers over economic issues.

9) Environmental Aspects

The government of Canada has proposed that a "Canada clause," affirming "... the identity and aspirations of the people of Canada," be entrenched in Section 2 of the Constitution Act, 1867. Among the "characteristics and values" proposed for entrenchment are:

- (1) "a commitment to the objective of sustainable development in recognition of the importance of the land, the air and the water and our responsibility to preserve and protect the environment for future generations;" and
- (2) "the balance that is especially Canadian between personal and collective freedom on the one hand and, on the other hand, the personal and collective responsibility that we all share for each other."

The first clause is explicitly environmental; the second may relate to individual and collective environmental rights and responsibilities. The legal and political effects of entrenching them are unclear.

Equally unclear in effect, but probably more important, is the proposal to entrench **property rights** in the Canadian Charter of Rights and Freedoms. Property rights are **not** defined in Shaping Canada's Future Together: Proposals (page 10).

Widespread environmental degradation constitutes a common-property resource problem. Environmental problems are shared, involuntarily, so that the distinction between individual and collective rights becomes blurred, if not meaningless.

As for collective rights, there is no Canadian bill or charter of environmental rights. Moreover, collective rights, in general, have been compromised by judicial interpretations of the Canadian Charter of Rights and Freedoms.

Individually and collectively, Canadians lack enforceable environmental rights.

As property rights are undefined in the federal proposal for their entrenchment, the ambiguity articulated by Paul Muldoon remains:

There are two sides to the argument, and it is unclear which will prevail. Property rights could mean a constitutional guarantee of everyone's right to pollute. On the other hand, it could make individuals more accountable for their actions, if their actions affect other people's property. But who knows how the courts will interpret property rights with respect to the environment? If you have an enlightened court, fine ... If you don't, the results could be disastrous.⁹

In light of the tendency for judicial interpretations of the Charter to favour individual rights relative to collective rights, and in view of the failure to articulate and protect environmental rights in the Charter, it is a possible outcome that the entrenchment of undefined property rights will inhibit environmental protection in Canada.

In its September proposals, the federal government proposed adding property rights (undefined) to the Charter of Rights and Freedoms. This would place the courts in the position of making both findings of fact (as whether a right had been infringed) and deciding remedies. The disadvantages of the judicial mechanism as a way of deciding remedies (i.e., its costs, delays, inability to balance competing societal interests and the increased litigiousness of society) have already been alluded to, in the context of a Social Charter.

The entrenchment of property rights should be approached cautiously. Clarification is essential. Do these property rights apply to common property such as air, water, and ecological systems? On the assumption that the set of rights is not exhaustive (that is, does not include all conceivable rights), what specific rights are involved? An insistence

⁹ Quoted by P. Mulvihill, "Would constitutional property rights inhibit environmental protection?", Alternatives, 15(2), p.6

on clear answers to such fundamental questions is a reasonable and responsible condition for commencing discussion of the entrenchment of property rights.

Environmental problems are important and will become more important. The evolution of Canada's institutions has not kept pace with the intensifying need for ways of resolving environmental problems. A hasty entrenchment of property rights may make matters worse and haunt Canadians for generations.

Minority Report by Professor J.R. Winter of the Advisory Committee
on Economic Issues

The problem confronting us is not to design an ideal constitution for a 'New Jerusalem' here on earth but to answer the fundamental question as to what are the minimum constitutional arrangements that the Maritime Provinces should rationally be prepared to accept to keep Quebec within Canada. A positive approach to negotiating constitutional amendments is essential if the different priorities of other cultures and regions are to be respected. This is quite different to that espoused by the Advisory Committee for maximizing constitutional guarantees, a process which lends itself to self righteous confrontations.

There are two reasons why every effort must be made to retain Quebec in some form of Canadian federalism. First there would be endemic as well as transitional economic costs to all parties from separation and the consequent non-amicable divorce would lead to long term political instability and potential hostile behaviour. As long as some form of union exists the rest of Canada will have at least some influence on events in Quebec which they wouldn't have otherwise, and there would always remain the opportunity to enlarge the area of consensus. Again is it not inconsistent to promise 'self government' to native peoples while denying 'distinctiveness' to Quebec?

The second reason is that at worst Quebec separation would lead to the balkanization of Canada and at best make the situation of the Maritime Provinces on the periphery much more vulnerable than it already is. On the political level unless persons in other provinces have continuing direct links with the Maritimes whether tangible or intangible, their interest in providing either equalization payments or frigates to small isolated provinces will wane proportionally and indeed already has. Not only is the region's population relatively declining in size but since it doesn't match the heterogeneity of the rest of Canada, so are its family connections.

On the economic level separation would impose significant constraints on this region's trade and communication linkages with Ontario and the West, not so much by overt interference as from the uncertainties arising from the fact that an independent Quebec could impede them at any time by unilateral actions. Arguments to the contrary that emphasize the freedom of the skies or the present use of truck corridors through the United States are misleading, either because they are not significant or special circumstances like lower gas prices make it worthwhile.

The Report of the Advisory Committee assumes that an independent Quebec would exploit its strategic position by discriminating in a malevolent or obvious fashion as in the case of Churchill Falls. More likely it would be implemented in the name of improving health, technology, environmental protection, quality control, economic development, or some other moral prerogative, while discriminating against outsiders with few advocates present to defend their interests. To overcome exactly these same difficulties the Maritime Premiers are pursuing a regional economic union.

The commonly cited analogy with Alaska is spurious since the U.S. mainland is historically and ideologically committed through defense strategy, territorial imperatives, and the desire for self sufficiency in energy resources, to keeping that state in the Union. Actually it is more than that since Alaska is so self sufficient that it not only does not collect income taxes but pays every resident a dividend of a thousand dollars a year. Unfortunately the Atlantic Provinces are not perceived as being quite so vital to the interests of Ontario and the Western Provinces.

The three economic issues most germane to constitutional change, namely economic union, transfer payments, and jurisdiction over resources, need to be ranked by their importance for the Province of Nova Scotia in negotiating a new constitution. It is difficult to generalize about resource jurisdiction since that will depend on the specifics in any particular instance. For example the primary sector of the ocean fisheries must clearly be a federal responsibility if anarchy is to be avoided, and the secondary industry should be subject to joint supervision because of the irregular pattern of catch quotas for processing. On the other hand education should be a provincial power not just because of the cultural implications but also due to the need for intimately involving people. Fully elected school boards in Nova Scotia are a case in point.

Control over the environment should be allocated along technical lines based on whether or not there are significant spillovers across provincial boundaries even though it may often mean that a province will be seen to be misusing its own resources when judged by the standards of others. The James Bay project is perhaps a case in point. Unfortunately imposing national standards on what are perceived to be local issues is not a feasible alternative and will only lead to them being either circumvented or ignored as has occurred in several provinces recently. Provinces apparently even overlook their own regulations upon occasion.

In regard to transfer payments the Report of the Advisory Committee pays undue attention to Equalization and especially the theoretical rationalization which has contributed little to either the inception or operation of this program. The thrust of the argument is that different economic policies across provinces may lead people to migrate to where they are not at their most productive, but that equalization payments can correct for this bias. There is no empirical support for this contention and the assumptions of the theory are both far too stringent and static to fit the real world.

A more directly applicable analysis of equalization is one that views it as a dynamic process where people and governments are not inert but respond to the incentives created by equalization payments. One result is that provincial governments are seen to escape accountability for these transfers by avoiding the levying of taxes, and therefore the moneys are often dissipated as regularly chronicled in the Auditor General's Report. Moreover, although a boon for provincial politicians, equalization payments are a relatively small part of the whole system of transfers.

Federal transfers may be conditional or unconditional, granted to persons either as individuals or corporate bodies, or to provincial governments, and for whatever reason, but they are nonetheless just 'transfers' of purchasing power regardless of what they are called.

As such it is questionable first off whether attached conditions are effective or do the transfers merely finance expenditures that would have been undertaken anyway and thus free up funds for other purposes? All in all the paths followed through successive rounds of spending or the ultimate beneficiaries cannot be known. However the net amount of transfers of purchasing power can be determined by the difference between federal spending and federal taxation in any province or region.

In total these amounts are substantial as shown in Figure I but the payments to provincial governments relative to persons vary considerably across Canada as indicated in Figures II and III. More pertinently real per capita net federal transfers going to Maritime provincial governments including equalization, increased steadily during the seventies before levelling off after 1980 while federal transfers to persons in the region declined significantly after that date as can be seen in Figures IV and V. Note that in current dollars these per capita amounts would be quadrupled.

Since it is obvious that equalization payments can be easily offset in the region by reductions in other formula financing or discretionary federal spending, there is no compelling reason for insisting on this particular form of transfer especially when it encourages fiscal irresponsibility on the part of provincial governments. More generally the evidence suggests that federal fiscal transfers to this region have displaced private capital inflows, lowered productivity, and distorted the industrial structure by subsidizing the import of manufactures, while neither eliminating income disparities nor providing self sustained growth.

The extreme instance of offsetting transfers is the experience of the Western Provinces where it is estimated that from 1961 to 1988 their loss through negative net federal transfers exceeded a hundred billion dollars despite the substantial positive payments to Manitoba and Saskatchewan over the same period. Essentially this means that Alberta and to a lesser extent British Columbia financed transfers to this region over the past three decades, not Ontario. For the most recent years borrowing abroad has become a significant source of transfer funding as low oil prices have seriously impaired the Alberta economy. Withal this ensures that the West like Quebec will oppose significant social rights being embedded in the Constitution.

In any event a social charter of consequence would be an invitation to disaster for regardless of what constitutional change takes place, Canadians from now on will have to significantly lower their expectations in regard to their living standards as a consequence of economic trends already operative. These are an aging population, low labour productivity as the legacy of an inappropriate educational system, and a massive debt accumulated without a concomitant capital investment to redeem it. Such trends will also have polarizing effects on the distribution of income as wage differentials widen between skilled and unskilled labour and income is transferred from taxpayers to bondholders. It is worth repeating that Alberta oil supplemented by foreign borrowing has financed Canada's affluence since the seventies but barring a miracle will not be available from now on. Amending the Constitution will not alter these facts.

To make the necessary adjustments with a tolerable amount of social stress will require a great deal of flexibility in the economy and freedom to undertake innovative policies for alleviating the most pressing problems of the moment. Present rigidities already make it extremely difficult to overcome the power of vested interests such as professional associations, supply management marketing boards, public sector unions not to forget university professors, and all the other groups claiming their 'rights'. A Utopian constitution could simply make a consensus impossible and along with mind numbing litigiousness lead to it being either ignored or made a farce of - the law can be an 'ass'. It would be doubly serious for the Maritime Provinces trying at the same time to cope with declining or disappearing transfer payments.

By far the most essential constitutional guarantee for this region is an effective economic union because of the greater scope it offers for making the sort of unpopular and difficult economic adjustments which will be inevitable. Unfortunately all provinces will be trying to restructure their economies and each will face strong internal pressures to adopt 'beggar thy neighbour policies'. Although control and monitoring of inter provincial trade barriers is feasible in the private sector, this is not true of the public sector where government procurement has just too many dimensions (e.g. reliability of suppliers, availability of service, employment, bureaucratic inertia, patronage, etc.).

Realistically the efficiency gains from any improvement on our present situation would be modest. On the other hand there would be very substantial costs incurred through dismemberment of the country, largely transitory though none the less painful as economic agents adjusted to the new realities of the private sector. At the same time the public sector would almost certainly be more interventionist and the adjustment period longer lasting.

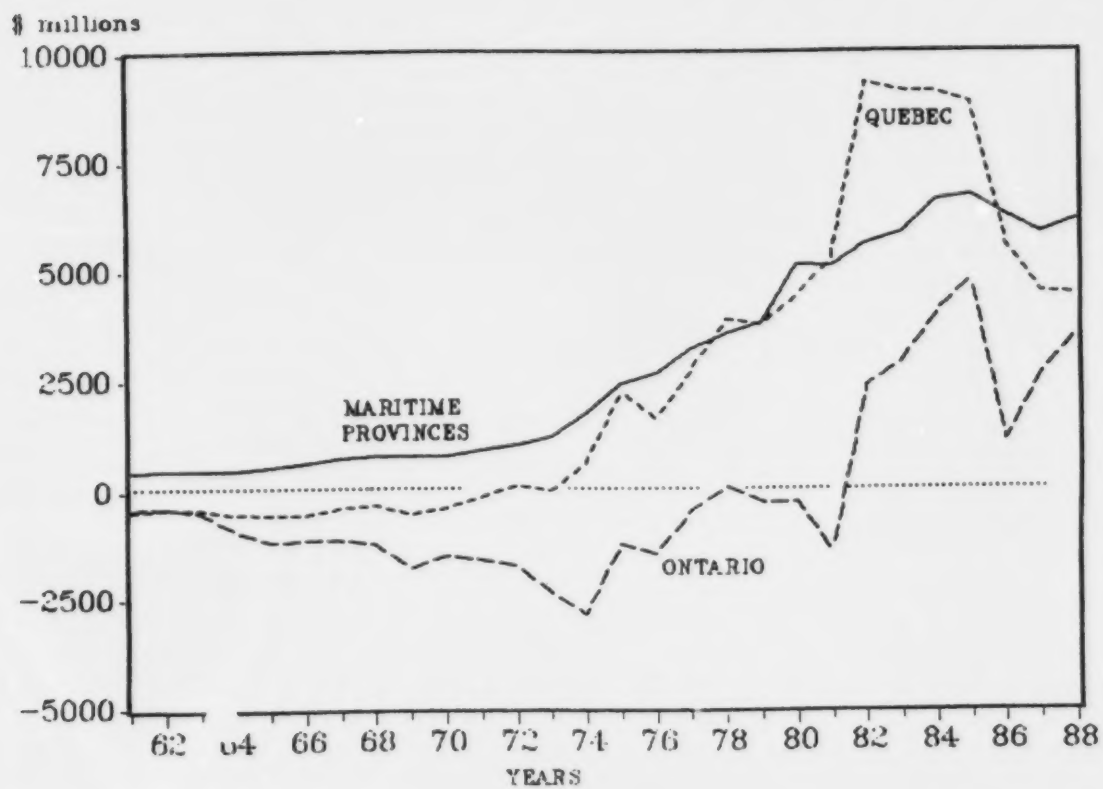
The best reason for insisting on a strong economic union has more to do with perception than reality for the really important thing about it is that individuals perceive it not as an avenue of material gain but as an essential form of freedom in that they can go where they want, work where they want, and buy where they want. For the most part people will not directly take advantage of the opportunities but the relevant thing is what they perceive to be available to them for that is the essence of a nation. It follows that anything which enhances such notions, even those as disparate as highway links and functional bilingualism, are important parts of the economic union.

The economic union is also a symbol, albeit one of great practical importance that needs to be made operative despite its limitations; thus merely extending the scope of Section 121 to include services would not be sufficient unless the provisions are monitored. And rather than relying on the courts for redress which is costly and ineffective, we might learn from MacKenzie King and deter offending provincial governments by way of unfavourable publicity arising from decisions of a quasi judicial body such as the Competition Tribunal. At the very least it would require explanations that would focus attention on the particular lobby groups and vested interests expecting to benefit from inter provincial barriers to trade.

In amending the constitution it must be realized that the three dimensions of federalism, regional distinctiveness which is its *raison d'être*, decentralization, and government intervention in the economy, are not independent. In fact it is not possible to increase the degree of all three simultaneously and this is the hard nut that many Canadians of good will find difficult to crack - they have to make a tough choice. Of course some avoid the problem by acquiescing in the separation of Quebec, others by pretending that the desire for distinctiveness can be settled by coercion. Those are dangerous illusions.

FIGURE 1

NET FEDERAL TRANSFERS



FEDERAL TRANSFERS TO PROVINCIAL GOVTS.

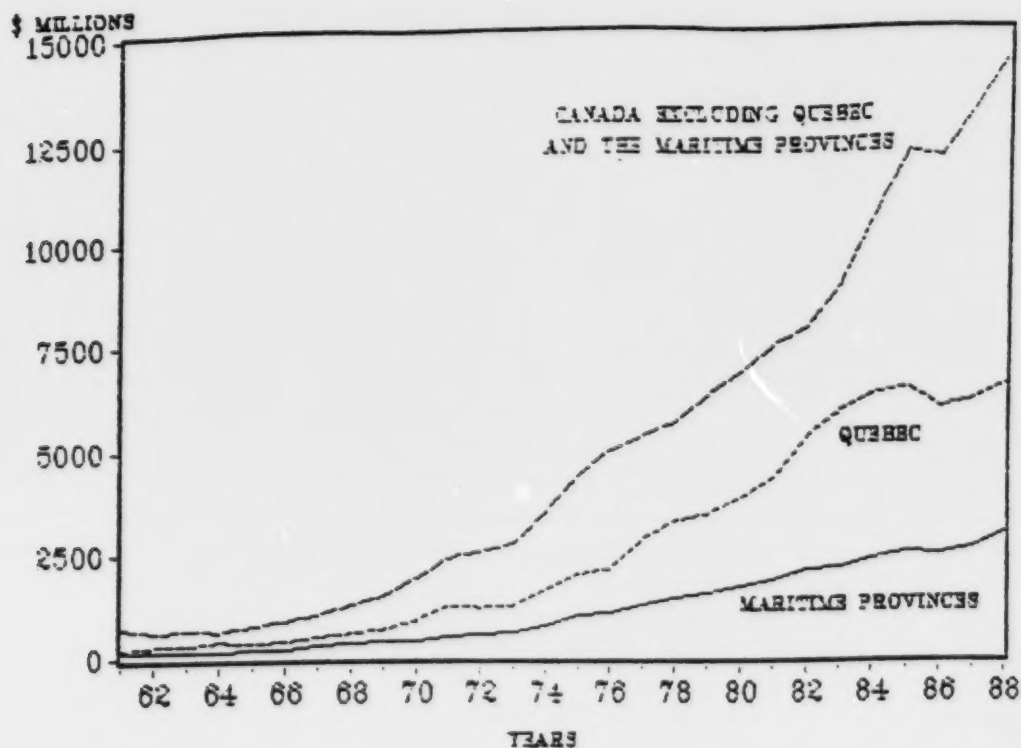


FIGURE II

FEDERAL TRANSFERS TO PERSONS

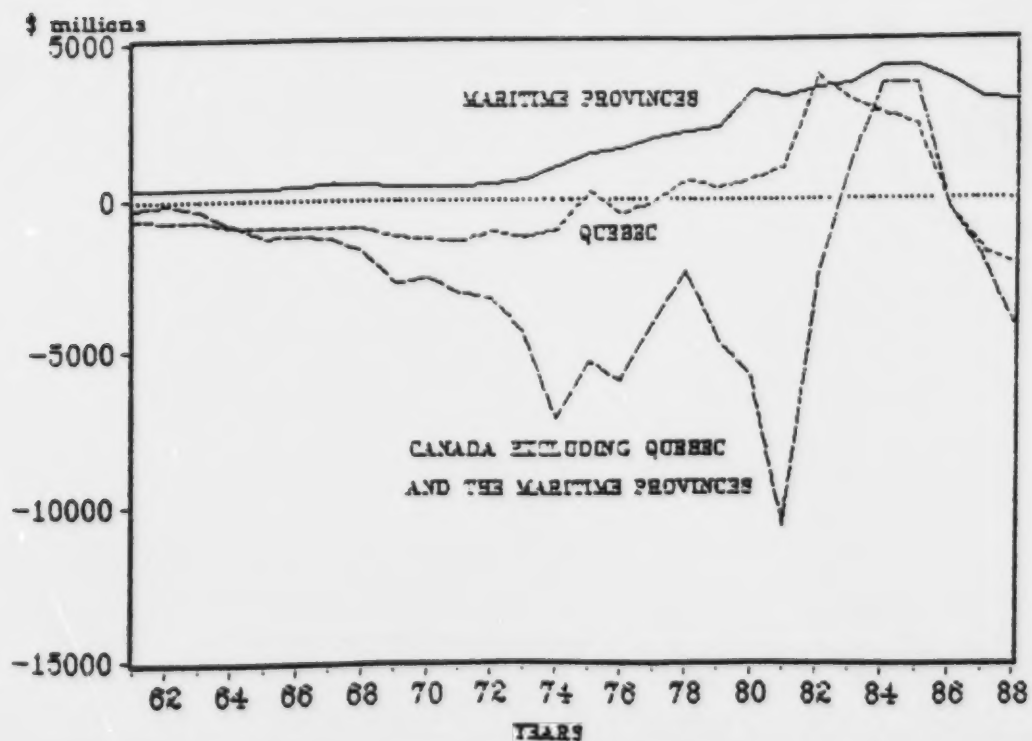


FIGURE III

REAL PER CAPITA TRANSFERS TO PROVINCIAL GOVTS.
(3 YEAR MOVING AVERAGE-\$1961)

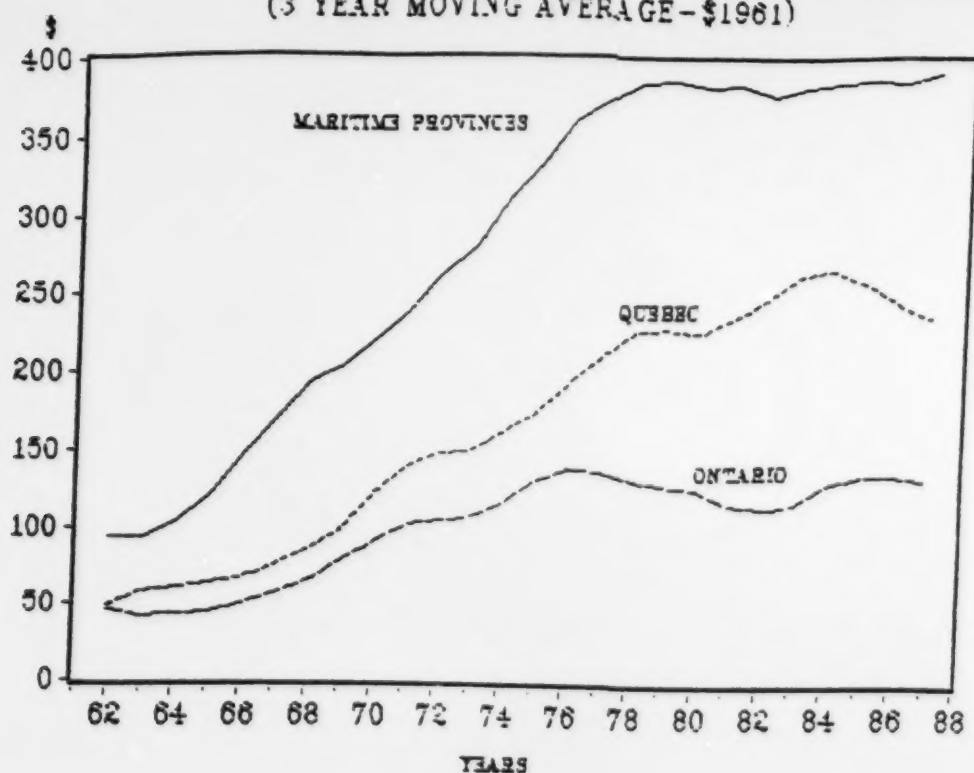


FIGURE IV

REAL PER CAPITA NET TRANSFERS TO PERSONS
(3 YEAR MOVING AVERAGE-\$1961)

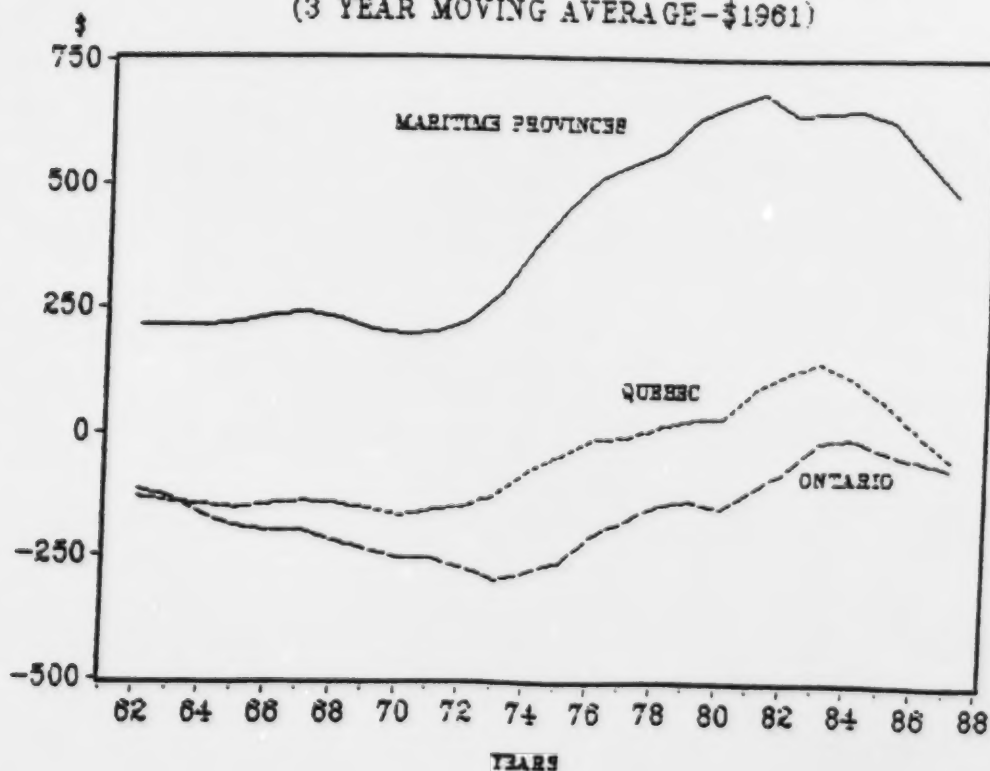


FIGURE V

Addendum: By Professor Alasdair Sinclair, Committee Chair

One member of the Committee, J.R. Winter, has written a minority report. It is worth noting that Professor Winter had the opportunity to present data to support his assertions during the four months in which the Committee met - yet during this time he presented no statistical evidence whatsoever. On a day or so before the report was due, the minority report arrived. Those references which could be checked in the time available are erroneous.

There are areas where professional economists differ in their interpretation of matters relating to constitutional issues. However, it must be pointed out that Professor Winter's discussion contains clear errors of attribution and of interpretation of the work of others.

Professor Winter accuses the Advisory Committee of supporting "self-righteous confrontations" and of assuming that an independent Quebec would act "by discriminating in a malevolent or obvious fashion" against the Atlantic Region. The Advisory Committee has gone out of its way to avoid self righteous confrontation, and has never suggested malevolence on the part of Quebec. Furthermore, the statement that the Committee has paid "undue attention to equalization" is simply out of touch with reality. He says "equalization payments are a relatively small part of the whole system of transfers," a ridiculous statement given they are worth \$970 million to Nova Scotia. The statistical charts in the minority report are basically unintelligible, and the statement that "equalization payments can be easily offset in the region by reductions in other formula financing or discretionary federal spending" has no basis in fact. Similarly, the statement that fiscally induced migration cannot be observed is wrong. And so on.

REPORT OF THE ADVISORY COMMITTEE ON CONSTITUTIONAL PROCESS

THE CONSTITUTIONAL AMENDING PROCESS

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THE CONSTITUTIONAL AMENDING PROCESS

I INTRODUCTION

Since the failure to ratify the Meech Lake Accord in June 1990, the constitutional future of Canada has been the topic of increasingly urgent debate. So far, a consensus has emerged on two things. First, federalism as it is enshrined in the Constitution Acts of 1867 and 1982 no longer meets the needs and aspirations of the majority. Second, the means used in the past to achieve major constitutional revision are no longer acceptable to the majority of Canadians. Put simply, constitutional revision is essential if Canada is to survive and the means of achieving this revision must be more open and more consultative in nature than in the past.

We have not yet reached a consensus on issues of constitutional substance or form, including the form public input should take in the future. But one thing is clear: if an agreement is reached on changes to the Constitution, the issues of how these changes can be achieved under the existing amending process and how future amendments can be accomplished will have to be addressed. Attention will also have to be given to the formal amending procedure involving the rules for ratification and the informal procedure involving how proposals for amendment are formulated and initiated. To that end, the federal and provincial governments have been studying these various aspects of the amending process from initiation to ratification, past, present and future. This report contributes to that undertaking.

II THE AMENDING PROCEDURE

The written and unwritten Constitution provides the foundation of our political and legal institutions by establishing the rules that govern how rules are made in Canada and how the political processes function.

The amendment process is the set of procedures, conventions and formulae governing how to change the rules about how rules are made. The amendment process, formal and informal, therefore, is a vital part of the Constitution as it provides the key protectors of the powers and rights assigned by the rest of the Constitution. In the current debate, the processes for amending the Constitution have received much less attention than issues of substance such as recognition of Quebec's distinct society; the recognition of the rightful place in the Constitution of aboriginal peoples; equality between the provinces; and, Senate reform. This does not mean that issues relating to the amending process can be treated lightly. In fact, the resolution of several of the substantial problems that confront us may involve changes to the amending process. We must also consider how those changes can be made with the least amount of conflict and disruption under the existing formula.

A constitution establishes powers and rights that have been gained through negotiation, compromise and convention; no stakeholder wants to see what it has won in this way too easily taken away or modified through constitutional amendment. An amending procedure, whether formal and/or informal, must, therefore, strike a balance between being restrictive enough to ensure constitutional stability and flexible enough to ensure constitutional relevance to changing national circumstances and values.

A constitution also has to provide an amending process that will allow future generations to meet eventualities that cannot be immediately envisioned. It is difficult to discuss formal amendment rules in the abstract, but if that is not done to some extent, the formulators run the risk of creating an amending formula that ties the future of a people to the resolution of contemporary problems.

III THE EXISTING AMENDING PROCESS

The terms of the process

The present rules governing formal amendment are set out in Part V (ss.38-49) of the Constitution Act, 1982. It establishes five formulae or processes:

- i) **UNANIMITY:** The Senate¹, House of Commons and Legislatures of every province must approve changes affecting the role of the monarchy, Governor-General and lieutenant governors; the right of a province to no fewer seats in the House of Commons than it had in the Senate in 1982; the use of French and English languages; composition of the Supreme Court of Canada, and amendments to the amending formula.
- ii) **MAJORITY:** The Senate, House of Commons and Legislatures of two-thirds of the provinces (currently 7) representing fifty per cent (50%) of the Canadian population must approve all changes not specifically assigned elsewhere. For changes affecting any rights, powers or privileges of provincial Governments or Legislatures; proportionate representation in the House of Commons; the powers, method of selection, number per province and residence qualifications of Senators; changes to the Supreme Court of Canada other than in its composition; extension of existing provincial boundaries into the territories; creation of new provinces; the Canadian Charter of Rights and Freedoms.
- (iii) **BILATERAL:** The Senate, House of Commons and Legislature or Legislatures of the particular province or provinces concerned must approve changes that apply only to one or several, but not all provinces, including changes in boundaries and changes relating to the use of the French and English language in a particular province or provinces.

¹ In all formulae in which approval of the Senate is *prima facie* required, it is possible to by-pass the Senate. If the Senate has not passed the resolution within one hundred and eight days of passage by the House of Commons, repassage by the House will suffice as the federal Parliament's approval (see s.47 of the Constitution Act, 1982).

(iv) **FEDERAL PARLIAMENT ALONE:** The Senate and House of Commons are alone responsible for changes in the executive government of Canada or in the Senate and House of Commons (other than those covered under other formulae).

v) **SINGLE PROVINCE LEGISLATURE:** A single provincial Legislature may independently make amendments to its own Constitution or decide to opt out of an agreement reached between Parliament and other provinces to change the proprietary or other rights of the provinces.

Informal changes to the Constitution can occur through changes in procedure, through judicial interpretation and through ordinary legislation, regulation and intergovernmental agreement.

Criticisms of the current process

Criticisms of the amending formula can be grouped into four categories.

i) There are complaints that the Constitution does not adequately safeguard the vital interests of a province, or even an entire region.

For example, Quebec is concerned that the general amending formula (the 2/3 and 50% rule) allows for passage of amendments that may be contrary to its cultural and economic interests, in spite of its opposition. Others suggest that the vital interests of a province, or even an entire region, could be negatively affected - despite its opposition - through the application of the majority rule. For example, the Maritime provinces might be adversely affected by a change to s.36 which is a commitment to provide essential public services and to promote equal opportunities and economic development in all of the provinces. The First Nations, on the other hand, argue that this is irrelevant to their concerns until there is recognition of their inherent right to self-government.

Quebec also feared that under the amending formula, Senate reform might take place without its support. This was unacceptable since Quebec regarded the Senate as a body which might at best be abolished or at the least given increased powers to enable it to seriously address regional interests. In another example, Quebec argued that if English Canada chose to reorganize the banking system under the existing formula it could do so without giving any heed to the impact of changes on the co-operative Quebec credit union system which is regarded in Quebec as an integral part of the province's modern revolution and culture. Therefore, Quebec wanted to have the power to veto such a change. As well, Quebec wanted a comprehensive compensation provision in the event of a province's opting out of cost-shared programs beyond those areas specified in Part V, education and culture.

To overcome these flaws, critics propose either conferring on the affected party a power of disallowance or requiring that the matter in question be one of those for which unanimous consent is required.

Supporters of the present formula suggest that it balances concerns for a regional voice with concerns for representation by population. In effect, it allows Quebec and

Ontario together to have a veto, or the West and the East as regions. Proponents note that this formula facilitates the realization of much needed Senate reform whereas unanimity would virtually prevent it. As well, the general formula helps to discourage a concentration of power and interest in central Canada.

- ii) Central to all of Quebec's criticisms of the repatriated Constitution and its amending formula has been the fact that it does not recognize the principle of cultural duality which would require the concurrence of both English and French-speaking Canada for basic constitutional change.

For Quebec this failure to recognize cultural duality is epitomized by the Charter of Rights. Quebec argued that the new Constitution gave the province less ability to control its cultural destiny than it had had under the British North America Act because authority had been transferred to the Supreme Court as the arbitrator of cases under the Charter of Rights. A ruling adverse to what the province saw as its cultural interests could only be undone by invoking the notwithstanding clause in the Charter, a politically unattractive option. For Quebec, anything to do with language and education were essential areas of provincial autonomy as both were seen as the key elements in the preservation of cultural identity.

- iii) Because they require unanimity, changes to Part V (the amending formula) are more difficult to bring about than most other types of formal constitutional change. Supporters argue that the unanimity requirement is not overly restrictive since the list is short, but it does make it difficult to change fundamental Canadian principles including the role of the monarchy and bilingualism.

- iv) There are criticisms of the processes through which amendments are to be initiated, negotiated and approved. Thus critics note that Part V indicates which legislative bodies must approve constitutional amendment, but sets no standards of adequate intergovernmental consultation or public participation.

There is also debate over the time that should be taken to ratify amendments. Some believe that the time limit of three years for ratification established in Part V is too long. However, supporters argue that it is a reasonable one which, in taking the form of a deadline, speeds up passage rather than slows it down. They believe that it is political will that determines the rate at which an amendment is passed, not the formula itself. Also, a period of three years provides enough time for public reaction and input.

We will explore these views in the following pages. For the moment it is enough to say that proponents of the present amendment process in Part V claim that it reflects the complex trade-offs that must be made in such a diverse country as Canada with such conflicting principles in play as the equality of provinces and the wide population disparities of the provinces. They suggest that it balances rigidity and flexibility and that it simply needs more time to prove itself.

IV PROPOSED AMENDING OPTIONS

The Meech Lake Accord

The terms of the Accord:

In 1987 the Prime Minister and the ten premiers signed what became known as the Meech Lake Accord, a proposed amendment to the Constitution which would bring Quebec on board, so to speak, as a truly consenting partner in Confederation.

The Accord proposed several constitutional changes, including two major changes in the amending formula of 1982:

- 1) It would have changed the compensation aspects of the opting out provision of s.40 to include all rather than just two circumstances in which the federal Government would be required to give compensation to provinces that chose to opt out of an amendment transferring the legislative authority from the provinces to the federal Government.
- 2) It would have extended the unanimity requirements of s.41 to include matters related to: powers and method of selection of the Senate; number and residency qualifications of senators; the principle of proportional representation in the House of Commons; creation of new provinces; appointment to the Supreme Court; and, extension of existing provinces into territories.

Assessing the Meech Lake Accord:

The reasons for the failure to ratify the Meech Lake Accord by June 23, 1990, were numerous and as varied as the differing visions of Canada that are held by Canadians. Basically, the criticisms can be divided into two groups, those of a substantive nature and those related to process.

As far as the process was concerned, critics argued that the Accord had been put together too hastily and too secretively and that there had been virtually no public input, and no thought given to constitutional implications for minority groups and interest groups outside of Quebec. As well, there had been really no opportunity for an assessment of public opinion or any concerted effort to inform the public as to the reasons and nature of the terms of the Accord.

The Meech Lake debate also drew attention to the ratification time frame of three years as set out in Part V of the Constitution Act, 1982. Some thought it was too long while others suggested it was too short.

The packaging of the proposed amendments came to be seen as a barrier to achieving change. The architects of the Accord had been afraid that the compromises arrived at through long negotiations might be shattered if some provisions were approved through the 2/3 and 50% rule but others were lost because they could not win unanimous

consent. Not everyone agreed. Some argued that the Accord could have been divided up so that only those parts requiring unanimous approval, such as amendments to the amending formula itself, would have been subject to such restraint. Most of the terms of the Accord, they claimed, would have passed relatively easily under the general majority rule.

The criticisms directed at the content of the Accord though often contradictory nevertheless are important in explaining its failure; here, we will discuss only that related to the amending formula.

The compensation provision was criticized by those who feared that it would result in such a high degree of decentralization that Ottawa would become little more than a tool of provincial funding priorities. They argued that the opting-out provisions would encourage provinces, with the financial resources to do so, to opt-out of the majority of programmes, thereby leaving the future of these programmes for the other provinces in jeopardy. Opting out might also curtail expansion of programmes such as medicare and prevent the introduction of others like a national daycare programme. Provinces like those in the Atlantic region expressed concerns that the federal Government might pull back on spending money to correct problems related to regional disparity because of the costs of having to pay a pro-rated share to the provinces like Ontario and Quebec who might opt-out of such programmes. Others raised the question of who would define national objectives for cost-shared programmes and who would determine what compensation would be due to a province opting-out but setting up a comparable programme.

The unanimity list was another source of conflict. The people of the Yukon and Northwest Territories feared that the unanimity terms would prevent them from ever gaining provincial status. Others feared that the expanded unanimity provisions would only add to the rigidity of the Constitution and make Senate reform virtually impossible unless it was included in a separate part of the constitutional reform package. This was a particular concern of those who wanted Senate reform but it was also raised by interest groups convinced that their needs should, at some time, be addressed as part of constitutional reform. For example, First Nations pointed out that their interests, especially in the area of self-government, had not been considered. They wanted to entrench self-government.

For Nova Scotia the immediate effect of the extension of the unanimity list proposed by the Meech Lake Accord would have been to enhance the province's influence. In the long run, however, the more rigid conditions established for the amending formula might have worked to the province's disadvantage, particularly insofar as Senate reform and changes to the Supreme Court are concerned.

The Allaire and Belanger-Campeau Reports

Following the failure to ratify the Meech Lake Accord the Quebec Liberal Party set up a committee, headed by Jean Allaire, to prepare a Party position paper on the constitutional issue. The report, entitled A Quebec Free to Choose, was released on January 28, 1991.

Stating that "Quebec has been asking the rest of Canada to recognize its uniqueness within the federation. It has demanded greater powers for its development ... a more decentralized federal system and a new distribution of powers to meet the aspirations of Quebecers more adequately", the Report favours federalism as a viable constitutional option for Quebec as long as a looser, considerably more decentralized federation is created.

The Report's proposal for the amending formula is that any constitutional change would require approval of 7 provinces representing 50% of the population with one of the seven having to be Quebec. Unanimous approval would not be required for any change.

The Quebec National Assembly also appointed an all party commission chaired by Michel Belanger and Jean Campeau to prepare a report - released on March 27, 1991 - on the political and constitutional future of Quebec. As far as amending procedure is concerned, the report suggests that the rigidity of the existing formula makes it unlikely that any modifications requiring unanimous consent will ever be approved. Like the Allaire Report, it insists that Quebec's consent will be required for any amendment that relates to, or affects, French Canadian culture in Quebec.

Assessing the Reports:

Both proposals would deny Nova Scotia the influence it currently holds as a result of the unanimity rule. That would make possible the elimination of the current provision guaranteeing to a province a number of MPs no fewer than the number of Senators it was entitled to in 1982. As well, Quebec's consent would be required for the passage of any amendment.

A requirement for Quebec's consent to any amendments could limit Nova Scotia's constitutional options though it might be preferable to a lengthy list of matters requiring unanimous consent devised to cover all of Quebec's concerns. The latter could limit the opportunities to introduce amendments that might benefit Nova Scotia.

The Beaudoin-Edwards Report

In December 1990, a Special Joint Committee of the Senate and of the House of Commons, co-chaired by Senator Gerald Beaudoin and Jim Edwards, M.P., was appointed to "consult broadly with Canadians and inquire into and report upon the process for amending the Constitution of Canada". The final report was released June 20, 1991.

The Committee concluded that the amending formula in the Constitution Act, 1982, is too rigid, too legislative in process and too extended in its ratification time frame. It recommended that:

1. The unanimous approval of Parliament and the provincial Legislatures be required only for amendments affecting the monarchy, the provisions of s.41(c) of the Constitution Act, 1982 relating to the use of the official languages and the proprietary rights of provinces vis-a-vis natural resources.

2. A regional veto formula be adopted for all other amendments. That is, to secure approval any amendment would require majority support from Parliament and each of four regions: Quebec, Ontario, the Atlantic region and the West. (Majority support would be defined in the western region, as the support of two provinces representing fifty per cent (50%) of the population in the region and in Atlantic Canada it would be defined simply as the support of two provinces.)
3. Creation of new provinces require only the consent of Parliament and the territory affected.
4. The present practice of appointing three judges of the Supreme Court of Canada from the Quebec Bar be entrenched.
5. Any amendment directly affecting the aboriginal peoples require the consent of the aboriginal community.
6. The extension of existing provinces into the territories require the consent of the Legislature of any affected province(s), territory and Parliament.
7. The ratification period be reduced to a maximum of two years beginning on the day on which a proposal is ratified by either a federal or a provincial Legislature.

The Committee also recommended that changes to Part V of the Constitution Act, 1982 should take account not only of the need to provide for revisions to the unanimity list and for a regional consent formula, but should be adopted in the context of a substantial package of constitutional reforms, including Senate reform. It also pointed out that where the creation of new provinces "may change the equilibrium within the federation", a review of the existing amending procedure might be required. If that were to be the case, such a change "would be governed by the amending procedure in effect at that time."²

Finally, the Committee made a number of recommendations for changes in the practices used to arrive at agreement on changes to the Constitution Act. These included suggestions for more fully involving representatives of the aboriginal peoples and the territorial governments in constitutional conferences; the further study of issues related to opting out; delegation and public participation, and the provision for the holding of national referendum at Parliament's discretion, "either to confirm the existence of a national consensus or to facilitate the adoption of the required amending resolutions."³

² Special Joint Committee of the Senate and the House of Commons on the Process for Amending the Constitution of Canada. Report (Ottawa, 1991), p.68.

³ Ibid., p.69.

Assessing the Beaudoin-Edwards Report:

A number of issues surround the regional veto proposal. Although Quebec might support a regional veto formula, the proposed regional configuration itself is contentious. British Columbia, in particular, claims to be a separate region while Northerners ask how the Yukon and the Northwest Territories would be recognized in the formula should they become provinces.

As far as Nova Scotia is concerned, the regional veto formula raises several issues. It is not clear what impact the regional veto approach would have on the province's influence in intergovernmental relations. From a national perspective it would probably strengthen regional alliances at the expense of connections between provinces with similar concerns but in different regions. The suggestion that ratification from the Atlantic region be based on the approval of two of the four provinces, regardless of the relative size of their population, makes it possible that the interests of the majority of the region's population could be disregarded. This especially concerns Nova Scotia because it has the largest provincial population in the region and the largest urban population.

One recommendation that is potentially significant for Nova Scotia is the substitution of regional for provincial unanimity in respect to the proportion of provincial representation in the House of Commons. If representation in the House of Commons is not protected by the unanimity clause it is possible that Nova Scotia could lose its level of representation. The fact, however, that other provinces in the region are even less likely than Nova Scotia to support such a change, renders this only theoretically a possibility.

The reduction of the time limit for ratification of amendments could be a retrograde step. The three year limit was intended to ensure that constitutional matters could be initiated at the provincial level and still have sufficient time to pass through the requisite number of Legislatures as well as Parliament. The experience of British Columbia in attempting to initiate an amendment suggests that a three-year limit might at times be needed.

The failure of the Report to address the issue of Senate reform leaves untouched an important matter of regional representation and may unnecessarily prolong its resolution.

Finally, the Acadians of Nova Scotia have fears about the referendum model arguing that it is not a suitable forum for resolving issues relating to the particular linguistic and cultural concerns of minorities. They do, however, have some interest in the idea of a constituent assembly as long as their interests are sufficiently represented.

Ottawa's September 1991 Discussion Paper

On September 24, 1991, Prime Minister Mulroney tabled the federal Government's proposals for redesigning the Canadian confederation. Entitled, Shaping Canada's Future Together, the document is intended to serve as a discussion paper to guide the debate over renewed federalism. It proposes both changes in practice and changes in the Constitution Acts.

Shaping Canada's Future Together avoids suggesting any changes to the Constitution that would require unanimous approval for passage. Anxious to avoid the problems encountered by the Meech Lake Accord, the Government only goes as far as to say it would consider adopting the amending proposals set out in the Meech Lake Accord if there was evidence of national approval for the idea⁴. No other amending formula options or amendments regarding initiation or ratification are offered. However, the federal Government would address changes to the amending formula if new provinces were created on the basis of the current amending formula and, "if it were found desirable to proceed ultimately with any items requiring unanimous consent in the final package."⁵

Assessing the Federal Discussion Paper:

Shaping Canada's Future Together offers little scope for comment here since it proposes no changes to the amending formula. The document does invite the provinces to revive the Meech Lake proposals and/or to work towards unanimity on some other undefined amendments to Part V of the Constitution Act. Since these are not specified, however, and we have already reviewed the amending provisions of the Meech Lake Accord, we will not comment on them here.

The issue of public participation in the constitutional amending process is addressed indirectly, through a commitment to solicit a public response to the proposals. Perhaps this is an indication that a new convention regarding public involvement in constitutional matters is beginning to develop. However, there is no explicit suggestion that public participation at any stage - initiation, formulation or ratification - will be provided for in the future either through convention or by formal provision in the Constitution Act.

V ACHIEVING AN AMENDING PROCESS

None of the proposals canvassed in Part IV above address all the issues raised in the constitutional debate. What follows is a summary of those issues as well as possible solutions which should be considered by the Province of Nova Scotia. The discussion is structured around the four key aspects of the amending process: the initiation of amendments: the content of proposed amendments: accommodating the varied visions of Canadian federalism: and ratification or formal enactment.

⁴ Shaping Canada's Future Together (Ottawa, 1991) p.25.

⁵ Ibid. There is one recommendation that could be incorporated in the amending formula, though in this case the federal Government is proposing that it be incorporated in some other section. In Part Three the federal Government supports the recommendation of the Beaudoin-Edwards Committee that the Constitution provide for the delegation of powers between Parliament and the provincial Legislatures. Once the ability to delegate is entrenched any specific delegation of legislative authority would require the approval of only the legislative bodies involved.

Initiation and Formulation

Who should be involved in initiating and formulating amendments?

Constitutional discussion and negotiation in Canada has been dominated by governments. This monopoly may have been justified when the discussion centred around the distribution of legislative power but in more recent times the focus of constitutional debate has widened in important respects.

At present there is no entrenched process for formulating and initiating an amendment. The existing amending formula refers only to ratification by the provincial and federal Legislatures. Thus, a motion for amendment can originate in the House of Commons, the Senate or any provincial Legislature. How that motion is formulated or brought to the appropriate legislative body is not alluded to. Nor is it clearly understood through convention except that formulation has generally fallen to the political executive and its advisors. Public input has never been a part of the initiation or negotiation processes. There have been royal commissions, task forces and some public hearings arranged to evaluate public reaction to issues associated with amendments. However, these have rarely influenced the initiation of constitutional proposals and there has never been a direct correlation between public opinion and the terms of the proposed amendment.

This traditional approach was fundamentally challenged when the Meech Lake Accord was introduced to the federal Parliament and provincial Legislatures for approval. Various groups, including aboriginal peoples, women, and people living in the Territories, charged that their particular constitutional concerns had not been addressed. The federal Government had not consulted them nor included sufficient representation of the Canadian population during formulation of the proposals that were the basis of the negotiations with Quebec. Public input had not been a part of any stage of the initiation process. This exclusion bred resentment which hardened into vocal and persistent opposition to the Accord. People wanted to have a say; not be presented with a fait accompli.

Public demand for a say in the process is rooted in the 1982 Constitution Act itself, particularly the Charter of Rights with its provisions for the fundamental human rights of citizens. Although the members of the public in general have treated the Charter as the mainspring of their claim for a role, the recognition it extends to certain disadvantaged classes of citizens has encouraged some groups to take a particularly strong stand on this issue. These groups include women, multicultural and multiracial communities and the disabled. Some of these groups want a guaranteed place in the shaping of the content of the final product. For example, some women's organizations are calling for equality of representation of the sexes in future reform processes. At a minimum, such citizens groups believe their opinions should be solicited and evaluated informally before amendments are finalized.

The aboriginal peoples also demand the right to speak and negotiate for themselves and to send their own representatives to the negotiating table, as sovereign entities. However, though there is a clear demand that aboriginal voices be heard, the form of their

participation is not clear. Many within the First Nations suggest that any involvement in the amending process would be seen as a compromise of their inherent sovereignty.

The people of the Territories, assuming much the same position with respect to their status as sovereign entities as the First Nations, and fearful that an amending formula might be included that would seriously jeopardize the realization of their aspirations for provincial status, want a say in and inclusion in the amending process.

It is clear that future initiatives for constitutional amendment must provide for public participation at the initiation and formulation stage. This participation must reflect the diverse nature of Canada - economically, politically, socially and culturally. It must be open. People want to know why something is being changed as well as the details of the change. Only then can the public fully and effectively participate in the amending process.

The amending procedure must restore Canadians' respect for and confidence in the process at all stages. Without abandoning the legislative and executive roles in initiation and formulation - though some argue that there ought to be a mechanism for popular initiation of proposed amendments - the amending procedure must be more responsive, more representative, more participatory and more informative. Whether ways to address these needs become a matter of convention or entrenchment will, to a large degree, be determined by the present constitutional agenda and whether amendment of the amending formula itself is to be considered in the existing climate.

How can an effective voice be ensured for all Canadians?

Involving the public in a constructive and informed debate on constitutional reform is a big challenge. So is finding a way to recognize and articulate a national consensus. The more players there are at the initiation and formulation stage, the harder it will be to establish terms which are not so inclusive as to be unworkable or so watered-down as to be useless. It is difficult to determine how best to put substantive proposals before the people for comment. Nevertheless, various suggestions have been offered with a view to ensuring that the public will be involved in the consideration and formulation of constitutional change. In the following paragraphs we will discuss the more significant of these - public initiation of amendments; constituent assemblies; and public hearings - and we will consider the special role that should be accorded to the First Nations.

i) Public Initiation:

As we have noted, only Parliament and the provincial Legislatures have the power to initiate amendments. In some countries, like Switzerland, popular initiation is one of the ways the public ensures that it is involved in the constitutional process and can exercise a reforming influence.

In the Canadian context popular initiation could take the form of a petition for amendment signed by a constitutionally defined number of citizens of voting age. If the formalities have been respected then the appropriate Legislature would be expected to launch the process of considering the amendment and ultimately taking the first step

towards its ratification. Alternatively, a permanent national or provincial constituent assembly could be empowered to formulate a proposal for constitutional amendment and if passed by an entrenched percentage of the membership, the motion for amendment would have to be introduced by one of the Legislatures or by Parliament.

Before a popular initiation process is introduced, however, a number of questions about it would have to be resolved. For example, it would be useful to consider whether the step would be unnecessary if there were adequate provision for public input in the overall amending process. Should there be limits on the areas of the Constitution that could be amended through this process? Would it be used frequently enough to justify the difficulties involved in trying to entrench it in the amending procedure?

(ii) Constituent Assemblies:

There is no formal process for the use of consultative bodies on a regular basis to correlate public concerns with constitutional reforms. The establishment of special selected bodies, known as constituent assemblies, that are representative of a broad cross-section of society might be one way to address this omission. They could be created at both the federal and provincial levels.

The role of constituent assemblies could be quite limited or very broad. They could, for example, be created each time a constitutional amendment were initiated and simply serve in an advisory capacity. Their main role would be to ensure that most elements in the community are consulted. Alternatively, they could be constituted as semi-permanent bodies with the power to initiate and formulate amendments. In whatever capacity, the key feature of constituent assemblies would be their representativeness.

A number of questions have to be considered in the development of procedure for establishing a constituent assembly. For example, who should be represented? Individuals? Governments? Political parties? Interest groups with a formal organization? Again, how would representatives be chosen from these bodies? Would they be appointed or elected? Would the selection be made by Government, through general election or by individual representative groups? How long should members remain in the assembly? What kind of mandate should representatives have - would they be delegates or representatives of their electors? How would fair representation of differing opinions within particular social groups be ensured? What would be the mandate of the assembly itself? Would it advise or formulate? Would it in turn be provided with expert advice? Could it initiate? Would it have a role in the ratification of the final product? How should the constituent assembly reach decisions? Would there be simple majority vote or a specially weighted majority? Would its meetings be made public?

The topic of constituent assemblies has received considerable attention over the last two years. They appear to offer one way of ensuring a fairly representative participation of the public in the amending process. However, evidence from jurisdictions employing constituent assemblies suggests that they are not particularly useful for purposes of constitutional revision. This was the conclusion of the comparative study of constituent assemblies presented in March 1991 by the Institute of Intergovernmental Relations. Like

public hearings, the value of the assemblies is dependent upon the degree of public interest, respect for and confidence in the assembly itself and their effectiveness.

iii) Public Hearings:

A public hearing approach offers a flexible vehicle through which governments could develop consultation devices. It also provides a means of determining the nature of any consensus. The point is illustrated by the efforts that have been made during the last two years by the Citizen's Forum, Special Joint Committee hearings and provincial legislative inquiries to draw the public into the constitutional process.

Public hearings are the easiest way of integrating new participants into the existing amending process. It is one way of making sure legislators are more sensitive to public concerns and aspirations. As democratically elected bodies, Legislatures and Parliament can conduct such hearings and interpret them with a degree of legitimacy. The problem is that traditionally such hearings, if held at all, have been held after the formulation of content. As well, to engage in well-informed discussion with the public, commissions and legislative committees need excellent preliminary organization, informative working papers made available to all and carefully set out criteria and rules regarding written and oral submissions. In fact, the hearings model requires a supportive mechanism which provides these on an ongoing basis.

A public hearings approach, then, also depends on consideration of a number of questions. For example, should the hearings be considered as part of a formal or informal process? How can public participation be ensured at the preformulation stage? Should there be a constitutional requirement for permanent federal and/or provincial standing committees on constitutional and intergovernmental affairs, charged with conducting public hearings at the initiation and formulation stage for all proposed amendments? If so, are the hearings to be conducted solely for advisory purposes or should they have some role in the actual formulation of amendments? How can all interest groups be guaranteed an opportunity to make representations? How can the existence of a consensus be determined? Should there be any restrictions on who can appear before a hearing? Should criteria for public hearings be specified in the Constitution or left up to the individual legislative bodies?

In the final analysis, public hearings are useful tools which should be used. They provide the public with an opportunity to participate. But public hearings provide no guarantee that public opinions will influence the final document. That would still be left to the political executive bodies. Furthermore, public interest in constitutional matters is not a given. The desire to be actively involved may wain after the initial novelty of ensured participation wears off. It would be important, therefore, not to restrict consideration of constitutional change to a forum that could be captured by interested minorities. Consequently, though public hearings might become part of constitutional

convention but consensus derived from such hearings cannot necessarily be taken as an accurate reflection of public opinion.⁶

iv) The First Nations:

In the current constitutional discussions the place of First Nations is a major factor. It is generally conceded that the First Nations have a role to play, but there is much uncertainty about the nature of that role.

While Nova Scotia has proposed the creation of a MicMac seat in the House of Assembly, it is apparent that there is need for much more dialogue on that, and before it is possible to arrive at an understanding of the form of participation of the aboriginal peoples in discussion concerning the amending process.⁷

Content: The impact of substantive issues on the amending formula

The history of Canada has been a history of different visions of community, some of which are competing. The constitutional debate has seen these various understandings of community translated into differing conceptions of what our constitutional life together should look like. The Constitution itself ensures that these conceptions cannot be easily changed. By differentiating between the levels of approval needed to change each part of the Constitution, the amending formula establishes the degree of protection that can be given to each concept of community. Thus, the position taken by each of the country's major communities towards the amending formula reflects the extent that community believes it can rely on the rest of the country to respect its vital interests.

In short, the politics of the amending formula are closely related to the debates that we are engaged in concerning the substantive issues in the Constitution. In the following paragraphs we will briefly relate these issues to the discussions surrounding the amending formula.

i) Cultural Uniqueness:

Concern for the survival and development of minority linguistic and cultural groups have dominated the constitutional debate. Both Quebec and the First Nations see constitutional recognition as distinct collectivities, with accompanying guarantees and powers, as essential to the continued revitalization and growth of their particular cultural communities.

⁶ A further consultative device, referenda, is discussed below.

⁷ As evidence of the need for further dialogue between the Government and the MicMac communities, we note that the MicMac refer to the proposed MicMac MLA as a "Treaty Deputy", which introduces a separate aspect.

The First Nations:

Confederation relegated the First Nations to the status of wards of the federal Government. Gone are the days when the aboriginal communities accepted the suppression, the isolation, assimilation and integration that went with that status.

The aboriginal peoples today are proud that they are the true founding "nations". Historically self-governing peoples, they want to reactivate that long dormant status. They demand treatment as a distinct cultural community with an equal seat or seats at the constitutional negotiating table, recognition as a sovereign community, entrenched powers to promote and protect their cultural interests and a guarantee that their consent must be acquired before constitutional changes affecting them, their treaties, their status and their rights can be amended or affected in any way. Pulled together as never before by a common interest, aboriginal organizations including the Assembly of First Nations, the Metis National Council and the Inuit Tapirisat are determined that their position in Confederation as an equal self-governing entity must be entrenched in the next package of constitutional reforms. They want their distinctiveness given not only constitutional recognition but also constitutional protection. Part of that protection lies in being accorded a recognized voice in the amending process. Like all the provinces they want sovereignty, though that sovereignty need not be recognized and exercised in the same way as it is by the provinces.

Quebec and the distinct society:

Concern for the survival of the French language and culture has been the driving force behind Quebec's dissatisfaction with Confederation. As we all know, the movement to separate has been the strongest expression of this concern. The two-nation approach and, more recently, the concept of the distinct society are much less extreme attempts to find a mechanism through which the Government of Quebec could maintain, or regain, its traditional status and authority. They do not represent a demand for a radical change in the role of Quebec, but rather a revival and modernization of the compromise achieved at Confederation.

Of the changes proposed in the Meech Lake Accord and the Allaire Report to recognize the distinct society, the ones that most directly affected, or affect, the amending process have to do with the provisions affecting the unanimity rule; the requirement for Quebec's consent; with opting out and delegation and with changes to the Supreme Court and the Senate. These changes will be discussed below.

ii) The power of consent and the equality issue:

Since no community wants to lose too easily what it has negotiated long and hard to obtain, each strives to ensure its interests are considered in the event of amendment. On the whole, there is agreement that those things presently requiring unanimous consent for passage should continue to do so. The question is whether the unanimity list should be lengthened. Provinces have particular interests in the sorts of amendments that may only be made with their consent. As we have seen, the First Nations and Quebec are

anxious that their individual consent be required for the passage of any amendment that may threaten the integrity and development of their respective cultural communities.

At play in this debate is the principle of the equality of provinces. First articulated by Alberta in rejecting the Victoria Charter and the concept of regional unanimity, this principle has since gained considerable popular appeal and has been vigorously promoted, in particular by Newfoundland. It is not easily defined but is generally associated with regional alienation from the dominance of central Canada and a rejection of so-called special status for any sovereign entity. Its key constitutional positions are an insistence on unanimous provincial consent to certain amendments to the Constitution Act; the entrenchment of provincial proprietary rights, and Senate reform, which is seen as a means of overcoming inadequate regional influence in national institutions.

iii) Senate Reform:

When it was created in 1867 the Senate was expected to serve as the "chamber of sober second thought", and as the protector of cultural and minority interests. But these expectations have not been fulfilled. Suggested improvements have ranged from abolition to revitalization with elected members and increased powers to help it realize its original purposes.

Under Part V of the Constitution Act, 1982, reform of the Senate falls under the 2/3 and 50% formula. Therefore, in some ways, reform could be achieved relatively easily. That was why the Meech Lake Accord proposal to add Senate reform to the unanimity list was not viewed favourably by those like Alberta who were anxious to make the Senate a more democratic and regionally representative institution; an elected, provincially equal and effective voice to counterbalance the House of Commons. A more effective Senate with diluted Quebec representation raises concerns about its potential to interfere with the promotion and protection of Quebec's culture. Meanwhile, Quebec, determined to guard against change in federal institutions which might jeopardize her position in Confederation, would prefer to see Senate reform placed in the unanimity clause list thus making any future interference from this quarter less likely. The Allaire Report has gone so far as to recommend the abolition of the Senate. The federal Government's compromise position proposes that Senators be elected, that representation be more equitable, but that there be no significant increase in its powers.

iv) New Provinces:

Under the present arrangements, new provinces may be created by negotiation with the federal Government and ratification of entry under the 2/3 and 50% rule. The territories have no role in the amending formula until they become provinces. The Meech Lake Accord would have required unanimity for the granting of provincial status to either of the territories. Because the majority of the population in the North is Inuit and Dene, these proposals were seen as a slight of the First Nations. As their populations have increased in number, the territories have been moving towards provincial status. They do not want to see their aspirations frustrated by the need for unanimous consent for their entry as equal partners in the federation.

If the granting of provincial status were retained under the 2/3 and 50% rule or if there were a return to the rule that applied prior to 1982, the creation of new provinces would affect the operation of the 2/3 and 50% rule so that existing safeguards to provincial interests would be reduced. This point is discussed below.

v) The Supreme Court:

Since 1949, the Supreme Court of Canada has served as the final court of appeal in Canada with respect to division of powers cases and since the Charter of Rights and Freedoms in 1982, as the final judicial arbiter of the Charter. The Court also serves as the final level of appeal for civil and criminal law for Canada giving judgment in not only matters within federal legislative competence, but also matters relating to the civil law of Quebec and the common law of the other provinces. Little wonder, issues relating to the composition and jurisdiction of the Supreme Court are extremely sensitive within the Canadian federation. In Quebec, for instance, there has always been concern that a sufficient number of civil law judges be on the court to ensure a fair hearing for cases emanating from a civil law jurisdiction. As well, since the Charter, Quebec, where collective cultural rights are highly valued, has viewed with some suspicion the role of the court as enforcer of the Charter, refereeing clashes between individual and collective rights.

Until 1982, the position or structure of the Court was not specially protected by the written Constitution, although there were fairly well-settled practices as to the complete independence and appointment on a regional basis of judges. However, in strict law, the Court was a creation of a federal statute subject to amendment by Parliament like any other. The Supreme Court consists of nine justices including three from Quebec, thereby recognizing Quebec's special concern with certain division of powers issues as well as its civil law nature. One justice from Atlantic Canada, two or three from Ontario and two or three from the West complete the Court. This practice of regional appointments is as old as the Court.

The Meech Lake Accord addressed several aspects of the constitutional position of the Supreme Court of Canada, giving the Court constitutional status and entrenching the number of judges at nine and the number of Quebec judges at a minimum of three as is presently the practice. This would not, however, have entrenched the practice of regional appointments apart from Quebec since it was argued that, as the Court increasingly concerns itself with the Charter rather than division of powers, ideological balance would be more important than regional balance.

Under the Constitution Act, 1982, amendment to the Constitution in relation to the composition of the Supreme Court requires unanimous approval. Constitutional amendments relating to other aspects of the Court fall under the general formula. Meech Lake would have made constitutional amendments relating to the Court more difficult to achieve by placing all aspects of the Court under the unanimity requirement.

Significantly, the Meech Lake Accord did not accommodate one of Quebec's long-standing claims, renewed in the Allaire Report, that the Supreme Court should not serve as a general court of appeal for Quebec. Allaire proposes that there be a "common

tribunal" to deal only with the constitutional matters and the enforcement of laws under the jurisdiction of the federal Government. The Allaire proposals appear to fall within the general formula category.

The federal proposals, while ignoring Allaire on the one hand, seem, on the other hand, to strengthen provincial influence on the Supreme Court by renewing the Meech Lake Accord proposal that Supreme Court judges should be nominated by the federal Government from lists put forward by the provinces - in effect, a checks and balances proposal. These changes would require approval under the 2/3 and 50% formula to be entrenched. This appointment process could probably be used even without constitutional amendment.

vi) The division of powers and the decentralization issue:

At the root of the debate over who should have what powers lie two visions of Canadian federalism. One favours a more decentralized union realized through a redistribution of powers which would see more areas of autonomy shifted from federal to provincial jurisdiction. The other envisages a strong, dominant central government. Some view the strength of a central government as essential; others think it denies local aspirations. Thus, the Meech Lake Accord and the Allaire Report proposals are criticized by some because they appear to weaken the federal Government by promoting the decentralization of its powers. While Quebec is the province most anxious to pursue increased decentralization, other provinces, like Alberta, are interested in acquiring entrenched increased control in such areas as tax collection. Quebec opposes centralizing tendencies which may create the impression that provincial governments are subordinate to the federal Government. The West and the East oppose centralizing tendencies which result in unilateral policy-making by the federal Government which is shaped as it usually is by the central Canadian business and political machines.

Nova Scotians must be concerned about increased decentralization. The province's interests lie in ensuring the continued flow of equalization payments and regional development monies from Ottawa. Moreover, small provinces, because of their size and limited financial resources, generally find it difficult to assume new areas of jurisdiction. While there are traditional resentments of policies devised in Ottawa to address the economic interests of central Canada with little apparent regard for the needs and circumstances of the Atlantic region, Nova Scotia is a major beneficiary of the central government programmes. In other words, a degree of decentralization may be in Nova Scotia's interests but the province should be careful to ensure that limits are placed on the extent of that decentralization. It may be possible to find room for both centralization and decentralization in a renewed federation. Delegation, as we shall see, preserves equal status for all provinces, but allows different balances of power depending on particular circumstances and interests.

vii) Social Protection:

In a country where some provinces have for many years enjoyed a wealth of resources; economic stability and growth and others hampered by the restrictions of

geography, regional disparity and economic instability, national social programmes and other financial assistance, or "safety nets", have become an integral part of the federal system. Since the 1930s, the less prosperous provinces have looked to the more fortunate ones and the federal Government for financial assistance to ensure the provision of a basic level of social services. This is one of the reasons why the economically peripheral provinces, although they are always working towards economic independence, believe that in the light of increasing decentralization of the federation, national shared-cost social programmes like the Canada Assistance Plan, Established Programmes Financing for health care and post-secondary education and equalization payments must be guaranteed in the Constitution. There have to be ways to limit the negative impact of decentralization.

Part III of the Constitution Act, 1982, makes a statement of commitment to promotion of equal opportunities, reduction in regional disparity and provision of reasonably comparable essential public services at reasonably comparable levels of taxation leavened by equalization payments. However, the non-derogation clause which introduces s.36(1) appears to render the "commitment" unenforceable. As a result, the Province of Ontario is proposing the entrenchment of a "Social Charter" clause which would render the commitment enforceable. Those who fear that an entrenched social charter would tend to transfer social policy development to the courts suggest that another solution would be to expand a strengthened Part III to include the existing national shared-cost programmes - including EPF.

Accommodating the varied visions of Canadian federalism

Most of the proposals offered to accommodate the different visions of Canadian federalism require either no change to the amending formula or can be approved under the 2/3 and 50% rule. Most would not entail extensive constitutional negotiation in order to be realized, though they do require acceptance of the fact that the constitutional status quo is no longer workable. In the final analysis, however, decisions to accept, try or reject any of the following suggestions will be dependent upon what visions of Canada a particular province may prefer to pursue in its own interests, the interests of its region or the interests of the country as a whole.

i) The problem of terminology:

A number of red herrings are often introduced into the debate about changes to the amendment rules. Because what is perceived to be the truth is often far more important than what the truth really is, the perceived meanings of certain phrases have repeatedly resulted in confusion, misunderstanding, misrepresentation and intolerance. Consider, for example, the concept of "Quebec's Veto". The characterization of this constitutional amendment issue as one in which Quebec is seeking a preferred or special status is not only inaccurate, but highly divisive. What is actually being discussed is the requirement for unanimity for certain kinds of amendments, whether it be provincial unanimity, regional unanimity or cultural unanimity. The use of the term veto might best be abandoned since it conjures up negative images of selfishness and special status for those specially granted so-called veto power. A more appropriate terminology is power of consent.

The phrase "equality of the provinces" is another red herring. At its most expansive, this means that every province has identical authority to block constitutional amendment. Even under the present rules this is not really the case. But how can anyone disagree with the proposition that all provinces ought to be treated equally? The problem is, of course, that what is being talked about is not treating all provinces equally but treating them identically. Identical treatment, after all, does not mean equality. One cannot successfully argue in favour of inequality but one can make an argument for different treatment of equal partners in the interests of cultural and economic peculiarities. The phrase "equality of the provinces" is a dangerous and misleading one in the context of constitutional amendment and is counterproductive.

ii) Cultural uniqueness:

The distinct society

The recognition of its distinct society is a make or break issue for Quebec. Equally important is the entrenchment of the powers that Quebec believes it needs to protect and promote its society in the future.

Given the significance of this issue, the inclusion of a distinct society clause in the Constitution Act has to be more than a simple statement of recognition and acknowledgement. It must be accompanied by guarantees with respect to the Charter and the power of consent. It is this latter requirement which complicates the ratification process in the upcoming round of negotiations because changes to the existing amending formula require unanimous consent. Unanimity may be difficult to achieve as long as some provinces stand by the principle of the equality of provinces or the argument that Quebec must not be given anything each of the provinces do not have.

Self-government for the First Nations

The federal Government proposals of September 1991 recognize the historical basis of the First Nations' demand for self-government. But, they do not acknowledge the inherent right to self-government. The aboriginal community has been making this request for recognition since it reacted to the White Paper on Indian Policy of 1969. The federal Government argues that it cannot constitutionally enshrine self-government as an inherent right because it is possible that opposition to this clause would be extensive enough to ensure that such a clause would not win the approval of the necessary seven provinces.

Clearly there is a need for widespread public education on the issue of inherent self-government so that the necessary ratification will be ensured. It is unlikely the aboriginal community will abandon this request unless much the same thing is guaranteed through another mechanism or clause. Similarly, the Allaire Report proposal that responsibility for "native affairs" be shared between the federal and provincial governments may very well frustrate the current trend towards self-government for aboriginal peoples and result in further constitutional deadlock.

As we attempt to define the place of the First Nations in the Constitution, our experience with the Meech Lake Accord and the Allaire Report draws attention to two issues relating to the amending process. First, the extension of the unanimity rule proposed in the Meech Lake Accord could have impeded the development of new provinces. Second, the Allaire Report's proposal that responsibility for "native affairs" be shared between the federal and provincial governments might frustrate the current trend towards self-government for aboriginal peoples.

If self-government comes to entail the granting of a kind of provincial status to First Nations the operative number of participants in the general 2/3 and 50% rule would be affected. It would consequently be necessary to make additional changes in the amending formula itself. This in turn would have to be dealt with under the unanimity formula.

iii) Consent:

Incorporating a requirement of consent for Quebec and/or the First Nations, whether by direct assigned veto under the 2/3 and 50% rule or by a regional formula as suggested by Beaudoin-Edwards, would require an amendment to Part V of the Constitution Act, 1982, which in turn requires unanimous approval.

Given the problems associated with obtaining unanimous approval for constitutional changes, it is unlikely such changes will be made, unless, as Shaping Canada's Future Together indicates, there emerges a consensus which wants such a change. If that were the case, the alternatives would be a specifically assigned power of consent, as offered in the Meech Lake Accord, or a regional approach. The latter has been considered unlikely in view of British Columbia's rejection of the regional model in the past and in view of the problems that approach would entail when new provinces are created.

iv) Provincial status:

Provincial status for the Territories would strengthen aboriginal representation in executive federalism but could further shift the operative number of sovereign entities from 11 to as many as 15. The admission of new provinces would require the recasting of the general amending formula and might very well raise arguments in favour of a regional consent approach rather than the equality of provinces approach.

One of the complications of making the territories provinces is that the operative number of sovereign entities shifts. Thus, the relative strength of each of the existing provinces is reduced. The admission of provinces will require some recasting of the basic amending formula which, in turn, requires that almost elusive unanimity support. One approach is to have the provinces admitted under the regular amending formula and then put in place a process to redesign the structure in light of the new addition(s).

Under the current general formula the requisite provincial consent is at least two thirds of the provinces containing at least 50% of the population. Two thirds presently translates into 7. In other words, at least one of the Atlantic provinces would have to agree before an amendment could pass. With the creation of new provinces, although the

current formulation can still apply, the operation of the amending formula would be affected. The addition of one new province would mean 8 of 11 provinces. The addition of two new provinces would make the requisite number 8 out of 12. At this point, an amendment could pass without the approval of any of the western or any of the eastern provinces. Although it is possible to opt out of certain types of amendments, it is not possible to opt out of amendments related to matters set out in s.42. Hence, the Atlantic provinces' interest in proportionate representation in the House of Commons or in Senate reform could be adversely affected.

These considerations suggest that a regional approach like that recommended by the Beaudoin-Edwards report would be advisable. If a regional approach were adopted, into what region would the new provinces be placed? While two provinces in the North could form a region, perhaps even be joined by a First Nations entity if self-government took the form of a kind of provincial status, there is concern that giving such a small region, in terms of population, a regional veto would not be acceptable to the other provinces. At the same time there is no compelling affinity between the North and any other region.

v) Decentralization - The division of powers and delegation:

The current constitutional balance between the federal and provincial orders of government can, in some respects, be changed without adjusting a comma in the Constitution. In areas of concurrent or overlapping jurisdiction, political agreement alone is required to alter the balance. For example, if the federal Government chose to withdraw from the area of personpower training, as suggested in Shaping Canada's Future Together, that could be done without any amendment to the constitutional text. Such a readjustment could be made across the board, and/or in respect of individual provinces. Differential political arrangements have long been a feature of Canadian federalism without any differentiation in the range of provincial powers, e.g. Quebec chooses to have and administer a different income tax system whereas the other provinces choose to piggy back on the federal scheme. Thus, asymmetrical federalism has been the norm rather than the exception.

Most powers in the Constitution Act, 1867 are assigned exclusively to either the federal Parliament or provincial Legislatures. The question of delegation is whether such "exclusive" powers can be transferred to the other order of government. It should be emphasized that delegation is not a real issue where concurrent powers are concerned, e.g. agriculture and immigration; if a new division is deemed desirable, the only thing required is that the relevant order of government vacate the field of jurisdiction previously occupied. Delegation only becomes an issue when the jurisdiction in question is exclusive both expressly and de facto to the other order of government.

The idea of delegation of powers by one level of government to another has been suggested as a way to facilitate some decentralization and asymmetrical federalism without having to resort to constitutional amendment. Both the 1964 Fulton-Favreau amending formula and the 1979 Pepin-Robarts Task Force on Canadian Unity contemplated constitutional amendments to allow direct legislative interdelegation. The idea has again found favour in the Beaudoin-Edwards Report and Shaping Canada's Future Together. It

is seen as a way to incorporate flexibility into the Constitution and as a means of accommodating particular provincial needs and interests and of allowing federal and provincial governments to re-arrange the division of powers in a fashion that would enable them to readily meet the challenges of global competition.

If delegation is viewed as an actual change in the Constitution, the ability to delegate would constitute a change in the amending formula and require unanimous consent. If, however, the ability to delegate were viewed as a means of not strictly enforcing the constitution, the ability to delegate could be introduced by an amendment under the 2/3 and 50% rule.

Interdelegation would allow for as much or as little use of the mechanism as a province wished, depending upon how much decentralization or centralization of jurisdiction a province wanted to pursue. Proponents argue that an amendment to allow interdelegation would be more flexible than a specifically constitutionalized amendment to meet Quebec's demands for wider provincial jurisdiction. The mechanism for a bilateral deal could be in place by the fall of 1992 without all the details (including fiscal arrangement) necessarily being sorted out in advance. It could also be more easily adjusted in future.

The recognition of the right of interdelegation could also facilitate the creation of new provinces. At present, for instance, until the Territories attain provincial status, they are legally subordinate to Ottawa and they are dependent on the support of 7 provinces to move to provincial status. If legislative interdelegation was possible, the Territories could move in stages towards provincial autonomy. They could attain full provincial status, but delegate back to Ottawa those things they did not believe they were ready to handle on their own for administrative and/or financial reasons.

The recognition of asymmetrical relationships among the provinces could make it easier to envisage First Nations self-government. First Nations self-government can follow the federal principles of co-ordinate sovereignty without expecting First Nations governments to have identical powers to the provinces or to each other.

Interdelegation is not, however, without its problems. It would conceivably become harder to know what government was responsible and accountable for what? The power of interdelegation might be used to make one part of the country substantially more decentralized than the rest of the country. Perhaps, as Ottawa retains fewer and fewer powers, there will be proportionately less interest in federal politics and the practice of delegation could feed on itself. Would MPs from a province where power over certain matters has been delegated from Ottawa be eligible to vote when Parliament is legislating on such matters for the rest of Canada? Would a province that has substantially removed itself from federal authority have any right to receive equalization payments financed by the rest of the country?

vi) Decentralization and opting out:

Opting out is an established feature of Canadian federalism which acknowledges the historic asymmetrical relationships between governments in Canada. Provinces are free to decide not to participate in national shared-costs programmes. As far as the Constitution is concerned, opting out is a decision on the part of a province not to go along with a constitutional provision that generally applies. A province that has dissented from an amendment adopted under s.38 may declare that the amendment does not apply to it. Where the non-applicable amendment relates to education or other cultural matters being transferred from provincial Legislatures to the federal Parliament, the opting out province has the right to reasonable compensation under s.40.

Proponents of opting out note that it is already an established feature of the Canadian system and suggest that it is a useful vehicle for reconciling, with the federation, very different visions of community. The Meech Lake Accord would have made the right of compensation generally applicable where centralizing amendments were concerned. However, opponents argue that this would encourage wealthier provinces to disassociate themselves from national undertakings, thereby simultaneously encouraging the decentralization of the country and weakening of the federal treasury.

vii) Social guarantees:

The suggestion that a social "safety net" be more explicitly guaranteed under Part III for the protection of those provinces dependent upon equalization payments and other national financial assistance programmes raises the question, *inter alia*, whether entrenched social guarantees should be treated as a federal "institution" requiring unanimous consent for amendment. It is doubtful that all provinces would agree to inclusion of Part III in s.41.

Nonetheless, unanimity status may be worth considering since those provinces whose residents are most dependent upon "safety net" programmes will want to ensure that reductions to the net cannot occur too easily in the future.

At present, any modifications to the "safety net" would come under the general amending formula. Details with respect to standards for future programmes and services should not be included in the Constitution, if only because it would be impossible to agree on those standards and the constitutional reform process could be stopped in its tracks. Quebec, for example, might agree to the entrenchment of programme objections but it would not agree to a restrictive setting of standards. (Professor Alasdair Sinclair's memorandum of September 3, 1991, to the Working Committee on behalf of the Economic Issues Advisory Committee addresses this question in detail.)

If the "safety net" guarantees are strengthened by more explicit entrenchment, some provinces may want the power to opt out of the federally structured net. For that reason, there should be some mechanism to ensure that the comparable provincial substitute is a net of the same weave and perhaps the same weight although of differing design. Some might disagree with opting out, and question if an opting out provision would contradict

the idea of an entrenched social safety net. However, an opting out clause might reduce objections anticipated from Alberta or Quebec.

Ratification

Two aspects of the ratification process set out in Part V of the Constitution Act, 1982 have generated criticism. They are, first, the amount of time provided for ratification and, second, the lack of a formal procedure for public participation.

i. Criticism of the time frame:

The Meech Lake constitutional round has given rise to concern that the ratification process may take too long. The present rules allow for a three year ratification process that begins as soon as the amendment has been adopted by Parliament or one of the provincial Legislatures. Some argue that this time limit exposes proposed amendments to too many changes of political climate and fortune, and in so doing may cast doubt on the integrity of the process. It also gives rise to the sense that constitutional debate is unending. These critics want it reduced. The Beaudoin-Edwards Committee, which holds this view, recommends two years. Others have suggested that the ratification period be 540 days from the first passage of an amending resolution.

Defenders of the three-year process believe that it might be a retrograde step to reduce the time limit. They point out that the three-year limit was intended to ensure that constitutional amendments could be initiated at the provincial level. It was assumed that a province would be unlikely to propose an amendment to the country without the endorsement of its Legislature and that even with that endorsement it would take at least three years for the initiating province to persuade the rest of the country to accept its proposal. The experience of the one province, British Columbia, that has attempted to initiate an amendment bears out this view.

ii. Criticism regarding lack of public participation:

Ratification of amendments by Legislatures has also been called into question on the grounds that the public at large should have the right to directly approve of changes to laws as fundamental as those incorporated in the formal Constitution. As the Beaudoin-Edwards Committee put it:

A great number of witnesses took the position that the Constitution belongs to the people and the people must be enabled to pronounce on it. From their perspective, a referendum is one of the best means of giving citizens the feeling that the Constitution does indeed belong to them and of allowing them the last word on approving or amending it.⁸

⁸ Special Joint Committee of the Senate and the House of Commons, The Process for Amending the Constitution of Canada (Ottawa: 1991), p.36.

Critics of this view argue that since Canada is a parliamentary democracy, our Legislatures should bear the responsibility for formally approving changes to the Constitution Act. They also make the following points:

1. Legislative ratification is more flexible than referenda, since it allows those who find fault with an amendment to formulate and pass resolutions that can be considered by other governments in future constitutional discussions.⁹
2. Minorities are apprehensive that their interests and concerns would be disregarded by the majority.¹⁰
3. Public participation in referenda and the debates leading up to them, varies considerably. Consequently some amendments would be thoroughly canvassed by the public while others would receive limited attention.¹¹

How should constitutional amendments be ratified?

i) Period for passage:

In dealing with this issue governments have two options. They can obtain unanimous consent to secure a formal reduction in the length of the ratification period, or they could achieve the same thing through a change in practice or convention. That is, governments could agree amongst themselves on a ratification period that is shorter than that provided in s.39 of Part V.

ii) Referendum:

Two types of referenda are referred to in the current debate. A consultative referendum allows a government to learn the public's view of a proposed amendment. The government is not obliged to follow the wishes of the majority. However, a Legislature could introduce conventional legislation providing for referenda in its jurisdiction, and bind itself to abide by the results. A ratification referendum is binding and could, if the necessary changes were made in the Constitution, replace the Legislature as the ratifying agent.

If Nova Scotia decided to employ referenda in the ratification of amendments to the Constitution, it could pursue one of the following options:

1. It could hold consultative referenda.

⁹ See the Beaudoin-Edwards Report, ch.IV.

¹⁰ The Beaudoin-Edwards Committee, for example, found that minority groups - francophones living outside Quebec, anglophones in Quebec, the representatives of the First Nations - were generally opposed to the use of referenda. *Ibid.*, p.38.

¹¹ *Ibid.*

2. The Legislature could bind itself to act in accordance with the wishes of the majority as expressed in referenda.
3. The Province could initiate an amendment to Part V of the Constitution Act that would require binding referenda in the ratification of amendments to the Constitution Act, 1982.

The first option, though it would not commit the Legislature to observe strictly the directions of the public, has merit on three grounds. First, a referendum on an upcoming amendment would be an experiment that would enable the Nova Scotia public to judge whether the referendum process did in fact provide for general involvement in the constitutional process. If the public at large were deeply involved and its regard for the Constitution were heightened as a result, then the experiment might be treated as a demonstration of the value of holding binding referenda in the future. Second, in similar fashion a referendum might establish whether or not minorities in this province have reason to fear referenda. Finally, the holding of consultative referenda would allow politicians and officials - and the public in general - to learn how to deal with the many subsidiary problems that occur whenever a referendum takes place. For example, the drafting of the referendum question can be contentious; steps have to be taken to ensure that the referendum campaign is conducted fairly and with ample opportunity for all sides to express their views.

The chief advantage of the second option is that it would allow Nova Scotia to recognize the desire of the public at large to take responsibility in the ratification process even though other provinces and the federal Government might not wish to use referenda elsewhere. Nova Scotia could introduce such a referendum through a simple statute and could therefore change the procedure at will. This would be seen by some as an advantage since it would permit experimentation with the process, but others would distrust the power of the Legislature to change the rules.

Finally, if Nova Scotia and the other Canadian governments were able to agree on incorporating a referendum process in the Constitution Act then it could be argued that the Constitution truly belongs to the people. However, an amendment to that effect would have to secure the unanimous consent of all the provinces and of the federal Government. As we know, this would be contentious and unlikely. We also know that if such an amendment were adopted and were to prove faulty, it would be extremely difficult to change.

VI CONCLUSIONS AND RECOMMENDATIONS

Some general considerations

As we Canadians draw up a formula for amending the Constitution Acts we are aware of the pressures of the moment. They are extremely urgent. But we must also take into consideration three broad factors that will always influence constitution-making in this country. They are:

First, the fact that the fundamental goal of a constitution is to set out a series of rules about the major issues of who has what powers and rights in the state. An amending formula is important because it makes it possible to change those rules.

Therefore, the architects of an amending formula must be careful not to lose sight of substance as they deal with process.

Second, an amending procedure must balance stability and flexibility in the Constitution itself.

Third, the processes of constitutional reform no longer involve governments alone. They must also involve the people at large, especially the representatives of the First Nations, women, disabled persons, ethnocultural and racial minorities.

In addition to these general considerations, today's discussion about modifications to the amending process has to take into account two special factors

First, because the very future of Canada is at stake all those involved in the constitutional reform process - governments and citizens alike - must decide what vision of Canada they want to attain and they must have a clear understanding of what they are prepared to give up and what they are determined to preserve in order to attain it.

Second, Quebec's constitutional agenda has set a deadline that may leave no time for lengthy debate.

These latter influences - along with an awareness of the mistakes made in the Meech Lake round - affect current discussions about the amending formula in two important ways. First, they suggest that it would be unwise to attempt to change the amending formula itself or, indeed, to make any change that requires unanimous approval.¹² Second, they make it important to simplify the present agenda for constitutional reform and to hold out to the many interests looking for other changes the assurance that their concerns will be addressed in the foreseeable future.

These considerations are of concern to all Canadians. What of Nova Scotia's interests?

Because Nova Scotia's political and economic influence has declined dramatically since 1867, the province probably stands to lose more than it can gain through constitutional revision. Most of the proposals now being considered for constitutional reform, in one way or another, force the province to confront the financial and political implications of having a small population and a constrained economy. Nova Scotia, therefore, must decide whether to resist any reduction in the safeguards that it now has, or, in the interests of a general national renewal that may or may not confer long-term benefits on the province, to agree to radical changes like those proposed by the Beaudoin-

¹² This consideration underlies the federal Government's proposal *Shaping Canada's Future* (Ottawa, Sept. 1991).

Edwards Committee. We recommend that Nova Scotia consider all proposals with generosity and with a larger vision of Canada.

This recommendation is made in the conviction that Nova Scotia should be taking an active role in the national debate. The province cannot watch from the sidelines, awaiting federal initiatives or those of others. After all, if Canada is in peril, so too is Nova Scotia. Therefore our ideas, mediating skills and gestures of a strong commitment to Canada are needed to build bridges of understanding to Quebec, to aboriginal peoples and to those who feel dispossessed or ignored.

Bridges cannot be built on words only, but on deeds. Nothing stands in the way of aboriginal self-government but the necessary political will; nothing prevents Nova Scotia from initiating its own set of constitutional proposals and then offering them for consideration to the rest of the country. Bold moves are required to demonstrate the deep commitment to Canada that Nova Scotians feel.

Substantive issues and the amending formula

The First Nations:

The relationship between the First Nations and the rest of Canada is currently on the constitutional agenda. The recommendations we make here are not intended to suggest any course of action by the First Nations. Rather, they advise the Government of Nova Scotia on the stance it should take towards including the First Nations in the Constitution. Our recommendations, which are underscored by a sense that the provincial Government should initiate consultations as soon as possible, are:

First, Nova Scotia, and the rest of Canada, must recognize the First Nations as a "founding people".

Second, having recognized the First Nations as one of the founding peoples, Nova Scotia must address the fact that the Constitution Act does not allow for their formal involvement in the amending process. The province should do what it can to end this exclusion. This can be done in many ways,¹³ but in particular Nova Scotia should work towards explicit recognition of aboriginal involvement in the initiation, formulation and ratification processes.

Third, in the spirit of ending exclusionary practices, Nova Scotia should recognize the right of the MicMac community to participate fully in the current constitutional reform process. The form that recognition might take should be determined through negotiated agreement between the MicMac and the provincial Government.

¹³ For example, Nova Scotia, by creating a seat in the Legislature for a "Treaty Deputy", would guarantee the MicMac a formal political voice. It might encourage other provinces to do the same. This vehicle of participation could prove to be particularly valuable in the negotiations about systems of aboriginal self-government.

Fourth, Nova Scotia has no reason to stand in the way of constitutional recognition of the inherent right to self-government for aboriginal peoples. Nova Scotia should support whatever amending process is most likely to result in recognition of inherent self-government for the First Nations.¹⁴

The creation of new provinces:

While Nova Scotia has no grounds on which it should or could refuse entry of new provinces into Confederation, it should ensure that the related changes in the amending formula do not discriminate against a small province that already has only limited influence in the amending process. Therefore, we suggest that Nova Scotia support the admission of provinces under the present rule, but at the same time initiate a process to redesign the 2/3 and 50% rule. We discuss below how this might be done.

More specifically, we also recommend that Nova Scotia support conferring provincial status on the Yukon and Northwest Territories when they apply for it. Since the majority of the population in both territories is drawn from aboriginal peoples, such support would also signal Nova Scotia's desire to see the aboriginal community obtain a stronger voice in the constitutional process.

The impact of a new division of powers:

In varying degrees the Allaire Report and the September 1991 federal document propose a renewed federalism that is considerably more decentralized than the present one. Nova Scotia's response to these proposals will depend on its sense of what minimum powers it - and Ottawa - must retain in order to protect the province's vision of its society. If Nova Scotia decides to forego some of its current powers in order to sustain Confederation, then it must ask what it can forego and how its new powers should be expressed in the Constitution. Most of these questions lie outside the scope of this paper, but two have to do with the amending formula.

Opting-out:

For an amendment which "derogates from the legislative powers, the proprietary rights or any other rights or privileges of the Legislature or Government of a province", it is possible under the existing formula for a dissenting province to opt out pursuant to s.38(3). Furthermore, where there is a transfer to the federal Government in relation to education or other cultural matters, an opted out province has, pursuant to s.40, the right to compensation from Ottawa¹⁵. Thus on those issues, the Atlantic provinces could protect their interests if they found them diverging from the rest of the country.

¹⁴ Recognition of a role for the First Nations in the amending process has implications for the formal definition of the relationship between the Province and the First Nations government. However, that relationship cannot be negotiated until the aboriginal peoples themselves determine what form self-government should take.

¹⁵ The Meech Lake Accord would have extended the right of compensation for an opting out province to all amendments transferring power from the provinces to the federal Government.

However, it is not possible under the current formula to opt out of amendments related to the matters set out in s.42. One could well imagine that a change in the principle of proportionate representation in the House of Commons or Senate or reform of the Supreme Court could find the Atlantic provinces with different interests compared to the rest of the country. Yet these are not the sort of issues where it would be possible to opt out. To ensure that the views from Atlantic Canada are not completely ignored, it may be desirable to amend the amending formula, at least in respect of matters set out in s.42(a) to (d). We suggest below how this might be done and note that on this point, the interests of Quebec and the Atlantic provinces could converge.

From Nova Scotia's perspective, the prospect of the Atlantic provinces being isolated on amendments where the rest of the country wanted to decentralize is troubling. It is even more troubling when we recall that the creation of new provinces would further diminish Nova Scotia's weight in the application of the 2/3 and 50% rule. This suggests that we should seek to add to the present opting out clause, the ability to opt out of decentralizing amendments.

Interdelegation:

Delegation offers the potential of providing a bridge between differing views of how centralist or decentralist a federation Canada ought to be. The real point of incorporating the capacity for legislative interdelegation into the Constitution would be in recognition of the fact that there would be different degrees of interest in the device. Some provinces would want to accept delegated powers from Ottawa, others would not, and indeed some (perhaps including Nova Scotia) might have an interest in delegating some powers to Ottawa.

Assuming the ability to interdelegate were available to everyone, the formal equality of the provinces would be preserved. However, the practical consequences would be to accept an asymmetrical pattern across provinces to a greater extent than is currently true. That poses some dangers, but it is preferable to having parts of the country driven by a decentralist agenda that may be contrary to their interests. Nova Scotia should explore the possibilities of using delegation as a way of realigning the current federal/provincial balance in a way that is more flexible than constitutional amendments transferring particular powers.

In order to keep a minimum core in Ottawa and the provinces, some limits would need to be placed on the ability to delegate; careful thought would have to be given to which powers were thought appropriate for delegation. The normal concept of delegation is that while it is initiated by mutual consent, it can be terminated at will by the party granting the delegated power. In the present circumstances of Canadian federalism it is clear that delegation would only be an acceptable device if the termination of the delegation arrangement also had to be by mutual consent. Anything less than this arrangement would be unlikely to satisfy Quebec or the western provinces.

If legislative interdelegation were styled as an actual amendment to the Constitution, then an amendment permitting legislative interdelegation would constitute a change to the

amending formula, which would require unanimous consent (s.41(e)). However, it can be argued that interdelegation is not an actual amendment to the Constitution, but rather an ability not to strictly enforce the Constitution. If cast in such terms, the 2/3 and 50% rule of s.38 (1) applies to an amendment that would permit legislative interdelegation. The federal proposal, Shaping Canada's Future, which suggests an amendment to permit legislative interdelegation,¹⁶ views it in this light. Nova Scotia should consider this proposal as something worth exploring seriously.

The Supreme Court:

In Nova Scotian eyes the Supreme Court of Canada has operated satisfactorily for more than a century, in spite of little in the way of constitutional authority concerning the composition and appointment process. Nova Scotia has no distinct interest in changing the constitutional treatment of the Court, but should not be troubled by any reasonable amending process related to the Supreme Court of Canada.

Three proposals have been made that would affect the Court and/or its place in the amending formula. The Meech Lake Accord would have required unanimity with respect to all constitutional amendments relating to the Supreme Court. This would not have adversely affected Nova Scotia's interests. Likewise, the Beaudoin-Edwards proposal should cause Nova Scotia no concern. Although it would not give the province a power of consent over constitutional amendments relating to the Supreme Court, the Beaudoin-Edwards formula recognizes and protects regional interests through its regional veto approach. The one area of some concern might be the concept of a final court of appeal in Quebec suggested in the Allaire Report. However, it is doubtful if this would seriously affect Nova Scotia.

Changing the amending formula itself:

Changes to the amending formula require unanimous consent. When they are included in a package of constitutional amendments they extend the unanimity requirement to all parts of the package. Hence, failure to secure unanimous consent may well, as in the case of the Meech Lake Accord, entail the rejection of the entire package. For this reason strategists of the current constitutional round have tried to achieve constitutional change without amending the amending formula itself.

Furthermore, there are no compelling reasons for Nova Scotia to argue for changes that would require unanimity. Nova Scotia has in the past found that matters of concern to the province can be dealt with satisfactorily in other parts of the Constitution. In some respects, too, it is in Nova Scotia's interest to avoid changes to the formula since doing so leaves undisturbed the key issue of the province's representation in the House of Commons and avoids the possibility of a re-arrangement of the amending formula along the lines proposed by the Allaire Report or even the Beaudoin-Edwards Report. For all of these

¹⁶ Shaping Canada's Future (Ottawa, 1991) pp.38-9.

reasons we believe that Nova Scotia should look, whenever possible, for solutions to current constitutional problems that do not require unanimity.

Nevertheless, it is possible that negotiations will require that some change be made in the amending formula. Furthermore, we should not preclude exploring reforms which may require unanimity if they are in the best or essential interests of the province. This may include such matters as the addition of social economic guarantees to the unanimity list, or terms with respect to the creation of new provinces. Nova Scotia should not be afraid to make proposals which, though they may require unanimous approval, might have support in other parts of the country. At the same time, Nova Scotia should avoid adding anything more to the constitutional agenda than is necessary.

Should changes to the amending formula be considered, we offer some suggestions for modifying it in ways that might be acceptable to Nova Scotia. We will discuss first some of the formal proposals that have been put forward by other governments.

First, Nova Scotia should make every effort to ensure that its allocation of seats in the House of Commons continue to be no fewer than the number of Senators by which the Province was represented in 1982.¹⁷ The Province should depart from this arrangement only if guaranteed adequate representation in an effective Senate.

Second, if there should be renewed interest in a regional amending formula, Nova Scotia might consider favourably the Beaudoin-Edwards proposal. Under this proposal, Acadian concerns in Nova Scotia, and in the Atlantic region, would be more likely to be addressed if two provinces from the region must approve a change that might be contrary to Acadian linguistic and cultural interests rather than one province as would be the case at present. Similarly, constitutional amendments advanced by a future federal government, ostensibly in the national economic interest but not necessarily in the interests of the Maritime provinces, would require the consent of the Maritime provinces under the regional formula but not under the 2/3 and 50% rule.

In addition to these matters, which have been much debated and might easily be proposed again, we have raised in this report a number of issues that might be addressed through a change in the amending formula. They are as follows:

First, as we have noted, the addition of new provinces could ultimately mean that the Atlantic provinces would be unable to prevent the passage of amendments to s.42 that could undermine their vital interests. The amending formula proposed by the Beaudoin-Edwards Committee addresses this concern. However, as that proposal has encountered strong opposition we suggest an alternative regional formula, as follows:

- a) at least half of the Atlantic provinces,

¹⁷ This is the major reason why Nova Scotia should not support the Allaire proposal. Quite apart from the fact that it requires Quebec's consent, the Allaire approach would expose the province's stake in proportionate representation to change by the majority.

- b) Quebec,
- c) Ontario,
- d) at least half of the western provinces, containing at least 50% of the population of the region, with new northern provinces being included in the western region, would have to consent to changes in s.42 (a) to (d). This formula, a slight adaptation of Beaudoin-Edwards and applied much more narrowly, requires consent from all regions, giving some extra weight to the provinces with larger populations.

Second, we have also noted that Nova Scotia may want a further change to the amending formula to offset the province's diminished weight in the s.38(1) formula as a result of the creation of new provinces. We have suggested that Nova Scotia should seek the ability to opt out of decentralizing amendments in addition to the ability to opt out of centralizing amendments as is now possible pursuant to s.38(3). This could be accomplished through a redesigned amending formula which, while keeping the 2/3 and 50% formula of s.38(1) for most amendments, would broaden the right of compensation available to opt out provinces.

Third, we have suggested that Nova Scotia seek an interdelegation clause.

Finally, we have suggested that at the appropriate time, Nova Scotia should work towards explicit recognition of aboriginal involvement in the initiation, formulation and ratification processes.

We wish to close this part of our discussion as we began, with reference to constitutional packaging. Given the distrust that now exists, agreement may be possible only if there is a package of interdependent accommodations. If that should be the case, then Nova Scotia would be best advised to assess each proposal in terms of a) its centrality to Nova Scotia's needs; b) its importance in the eyes of others. This would enable the province to support a package while minimizing the danger of conflict and even rejection of the package.

Public participation:

Public confidence in the constitutional amending process must be restored. Public participation must become a part of the constitutional amending process. Furthermore, representation must ensure that the voices and views are heard and considered of local aboriginal peoples (Union of Nova Scotia Indians, Confederation of Mainland MicMacs and Native Council of Nova Scotia), of the Acadians and other social, cultural, political and economic interest groups.

In the following paragraphs we review how public participation might be provided for in the initiation, negotiation and ratification stages of the amending process. Throughout we take the position that though it may be desirable ultimately to incorporate

public consultation processes in the Constitution Act, for the moment Nova Scotia should attempt to bring about changes in the conventions surrounding the amending process.

In support of this position, we reiterate two points that have been made earlier. First, adoption of a convention avoids the difficult and fractious process of securing unanimous consent to a change in Part V. Second, given Canadians' limited experience with public involvement in the initiation, drafting and approval of constitutional change the convention approach offers a flexible vehicle through which governments can develop consultation devices. Experimentation and study of various types of public participation processes would help establish those that best meet Canadian needs over the long term. Finally, given the existing constitutional time frame and the lack of experience with public participation processes, it is not feasible or desirable for Nova Scotia to support the formalization of a participatory role in the present negotiation of constitutional reforms.

Consistent with this position is our view that Nova Scotia should reject the concept of a constituent assembly, at least for the current round of constitutional debates. As far as the future is concerned, Nova Scotia could experiment with its own constituent assembly.

At the same time, given the experimental nature of public participation in the constitutional process, we believe that it is advisable to establish a continuing body - a Constitutional Review Commission - that would be charged with reviewing the Constitution on an ongoing basis. Like the Law Reform Commission of Canada it would investigate and make recommendations on the advisability of incorporating new provisions - including structures such as a constituent assembly - in the Constitution.

i. Initiation

We assume that the majority of amendments to the Constitution will continue to originate with the federal and provincial governments. However, we believe that a provision for popular initiative should be investigated. For example, the province could establish a process whereby a given number of electors could require the Legislature to hold hearings into a proposal to initiate an amendment to the Constitution.

ii. Negotiation

A mechanism must be found that marries executive federalism to the need for public participation. We suggest that one way to do this would be to conceive of the following stages in the negotiation process:

1. An amendment would be formally proposed to the First Ministers' conference after having been initiated either in the fashion suggested above or in the traditional manner by the originating government.
2. A preliminary draft would be developed through intergovernmental negotiation.

3. Public hearings would be held - possibly with joint provincial-federal sponsorship - to ascertain public reaction and to allow public recommendations for amendments or rejection of the proposals.
4. A second round of intergovernmental negotiations would follow that would draft a proposed amendment that would take account of public reaction.
5. The proposed amendment would be submitted for ratification.

In time, such a pattern of consultation, if it were well received, might become a convention. Although no government would be obliged by law to hold public hearings at any point in the initiation, formulation or ratification stages, it would be well advised to do so, since such hearings help to gauge public reaction and to give the public a sense of confidence in the processes of constitutional change.

iii. Ratification

We believe that the ratification process should make ample allowance for public participation. Consequently we are uncomfortable with suggestions that the ratification period be shortened. If the ratification period is reduced to two years or eighteen months, it may be difficult to hold adequate public hearings. (We also note that any proposal to shorten the ratification period would require unanimous consent.)

We recommend a compromise position that, again, suggests the building of a constitutional convention. In this case, we would expect that following the negotiation process described above, the participating governments would agree on a timetable for ratification. The timetable would provide for passage of "substantive" resolutions in Parliament and the Legislatures in order to set in motion final pre-ratification hearings. These substantive resolutions would not start what is now a three-year countdown to ratification. Rather, the ratification countdown would begin, by agreement, as soon as the pre-ratification hearings were completed.

Such a procedure would not be foolproof. Pre-ratification hearings might take longer than expected, perhaps even causing further negotiations. Changes in government could lead to abandonment of amendment projects. (Though difficulties of that sort could be guarded against if the leaders of opposition parties were extensively consulted during the negotiation process.) Nevertheless, the procedure would avoid the premature initiation of the formal ratification process and so would go far to eliminate the pressure of deadlines like those that undermined the Meech Lake process. At the same time it would ensure adequate public consultation concerning amendments. If the procedure were found to be effective, the formal ratification period could be amended - perhaps to considerably less than two years - without fear of jeopardizing the opportunity for public consultation.

If Nova Scotia decided to employ referenda in the ratification of amendments to the Constitution, it could pursue one of the following options:

1. It could hold consultative referenda.

2. The Legislature could bind itself to act in accordance with the wishes of the majority as expressed in referenda.
3. The Province could initiate an amendment to Part V of the Constitution Act that would require binding referenda in the ratification of amendments to the Constitution Act, 1982.

The first option, though it would not commit the Legislature to observe strictly the directions of the public, has merit on three grounds. First, a referendum on an upcoming amendment would be an experiment that would enable the Nova Scotia public to judge whether the referendum process did in fact provide for general involvement in the constitutional process. If the public at large were deeply involved and its regard for the Constitution were heightened as a result, then the experiment might be treated as a demonstration of the value of holding binding referenda in the future. Second, in similar fashion a referendum might establish whether or not minorities in this province have reason to fear referenda. Finally, the holding of consultative referenda would allow politicians and officials - and the public in general - to learn how to deal with the many subsidiary problems that occur whenever a referendum takes place. For example, the drafting of the referendum question can be contentious; steps have to be taken to ensure that the referendum campaign is conducted fairly and with ample opportunity for all sides to express their views.

The chief advantage of the second option is that it would allow Nova Scotia to recognize the desire of the public at large to participate in the ratification process even though other provinces and the federal Government might not wish to use referenda elsewhere. Nova Scotia could introduce such a referendum through a simple statute and could therefore change the procedure at will. This would be seen by some as an advantage since it would permit experimentation with the process, but others would distrust the power of the Legislature to change the rules.

Finally, if Nova Scotia and the other Canadian governments were able to agree on incorporating a referendum process in the Constitution Act then it could be argued that the Constitution truly belongs to the people. However, an amendment to that effect would have to secure the unanimous consent of all the provinces and of the federal Government. As we know, this would be contentious and unlikely. We also know that if such an amendment were adopted and were to prove faulty, it would be extremely difficult to change.

Given the limited experience Canada has had with referenda and with public involvement in the constitutional process we agree with those who argue against entrenching a referendum process into the Constitution Act at this time. A bias in favour of further experimentation and a sense that the constitutional agenda is already overloaded with issues of immense significance to the future of the country combine to suggest that procedural reforms of this sort should be experimented with by individual governments and considered for entrenchment at some future constitutional round.

REPORT OF THE ADVISORY COMMITTEE ON COMPARATIVE FEDERALISM

LESSONS IN COMPARATIVE FEDERALISM



REPORT OF THE ADVISORY COMMITTEE ON COMPARATIVE FEDERALISM

LESSONS IN COMPARATIVE FEDERALISM

EXECUTIVE SUMMARY

The Committee on Comparative Federalism was charged with the task of examining other federations to determine whether there are lessons to be ascertained for this province in preparing its position for the current round of constitutional talks with particular reference to Quebec's position in the Canadian federation.

As the list of recommendations illustrate, we have examined other experiments in federalism with a view to discerning whether we in Canada, and in particular, Nova Scotia, can learn from the experiences of these federations which would assist us in our present constitutional situation. Our study has included examinations of both institutions and society. The latter is of great significance for it is useless to build federal institutions for a non-federal society. We have also looked at certain of the proposals of the Government of Canada from a comparative perspective.

We make specific recommendations on the Senate, the division of powers, the Supreme Court of Canada, the amending formula and intergovernmental co-operation. These recommendations are based upon our inspection of other federal societies and their institutions.

LIST OF RECOMMENDATIONS

We commend the Government of Nova Scotia for the establishment of the Working Committee and encourage the legislators to consult constantly with Nova Scotians as the constitutional process unfolds so that the institutions which evolve will reflect the desires of society.

We recommend that Nova Scotia advocate the division of the Supreme Court of Canada into two along the lines currently found in Germany. We also recommend Nova Scotia advocate an indirect provincial input into the selection or ratification of Justices to the new Constitutional High Court through the Senate as is discussed below.

The Nova Scotia government should promote a Triple E Senate. While elected and effective should not be negotiable, it should be recognized that we may have to settle for equitable. But the starting position must be equal.

This upper house should have a triple role:

- a check on the centrally dominated House of Commons
- a house of the provinces
- a "charter group" house.

In order to be an effective check on the House of Commons while at the same time avoiding the problem of power without responsibility, we advocate an across the board one year suspensive veto on all legislation, excluding money and appropriation bills and measures to raise funds through taxation where the veto should be 90 days. But the Senate would not be a confidence house.

The electoral system adopted should be a PR system which aids rather than hinders, the election of minorities and women. We recommend the non-transferable vote. This allows voters the option of either ranking all candidates or, if they prefer, voting for any number of candidates thus weighting their vote for their strongest preferences.

To encourage the provincial nature of the house, Senate elections should track provincial elections. It is hoped this will have the effect of reducing federal- bashing provincial election strategies.

We recommend that the Senate confirm Supreme Court appointments, by simple majority in the case of the common law justices, and double majority for civil law justices.

We recommend, see below, that the Council of the Federation be scrapped in light of the above Senate proposals.

We believe that the proposal for a Council of the Federation should be rejected by Nova Scotia. Not only would it complicate the federal legislative process, but its excessive formality and rigidity might actually impede intergovernmental collaboration. If there should be a need for the formal registration of provincial approval of federal initiatives, then this could be handled just as well by means of orders-in-council or, indeed, by resolutions passed by provincial legislatures as in the present constitutional amending procedures.

We also believe that more consideration should be given to the potential for inter-provincial collaboration in achieving national standards in areas of provincial jurisdiction. Experience in both the United States and Germany with respect to inter-state compacts and similar arrangements warrants further and serious consideration.

We recommend that Nova Scotia give serious study to both the 1964 and 1971 amending formulae. Either one of these would give Quebec its desired "veto", yet at the same time, provide sufficient flexibility if one on one delegation is permitted in the Fulton-Favreau (1964) formula.

INTRODUCTION

"Unless there exists ... the federal spirit, that is to say, a firm determination to maintain both diversity and unity by way of a continuous process of mutual adaption, a federal order cannot last."¹

Any attempt to compare experiments in contemporary federalism is fraught with danger. There is no acceptable "scientific method" to measure the successes and failures of individual federal experiments. There are, however, common themes through which one can gauge the diversity and the unity of twentieth century federations. Common amongst these are the twin pillars of society and institutional structures. However, just as it is difficult to place a gothic tower on a romanesque cathedral; so it is hard to transport concepts from one federation to another. Nonetheless, just as the Victorian architects benefitted from the experiences of their gothic forbears, so it is with federalism. Canadians can, if they so desire, learn from societal and institutional experiments and experiences of other federations.

This essay examines some of the more pertinent aspects of contemporary federalism and in so doing, presents a possible route for solving our present discontents.

One must remember as W.P.M. Kennedy pointed out in 1935:

"... there is no method that I have ever come across, or that the mind of man has ever conceived of changing a federal constitution that will satisfy everybody."²

The basis of federalism is one of compromise and respect. Citizens must be open to compromise and they must be prepared to respect the views of others, particularly those of the minorities. If these two conditions of human nature do not exist, the federation will fail.

Contemporary federations are "hybrids", each with its own distinctive characteristics. Just as the seed of a "hybrid" is often difficult to germinate and cultivate in new surroundings, so it is with federal institutions. Indeed, it may be impossible to transplant certain successful institutions from one federation to another. On the other hand, some "hybrids" when transplanted choke out the native plants and alter the landscape; so it is with federations. Yet, as this study illustrates, like the botanists, we can learn from the experiences of all other federations. Contemporary federalism might be defined as:

"The principle of political organization by which concurrent desires for territorial integration and diversity within a society are accommodated by the establishment of a single political system within which central and provincial governments possess co-ordinate authority such that neither level is legally or politically subordinate to the other."³

¹ Carl J. Friedrich: Trends of Federalism in Theory and Practice, New York, 1968, p. 175.

² W.P.M. Kennedy: Parliament of Canada, Special Committee on the British North America Act, 1935, Proceedings and Evidence and Report, Ottawa, 1938, p. 74.

³ R.L. Watts: Multi-Cultural Societies and Federalism, Ottawa, 1966, p. 22.

SOCIETY

Commentators on contemporary "interdependent" federalism generally agree that the true essence of each federation is not to be found in the institutions of a federation (e.g. the Constitution, institutions, the Courts, the division of powers, and the amending formula, etc.) but in society, including its structures (e.g. political parties, elections, pressure groups, and myths) and its tolerance of the views of minorities. Furthermore, it appears that the centrifugal forces which are present in all federations are most appropriately handled and diluted not by the institutions of government but by society. This is a lesson Canadians have yet to learn.

Federalism might be compared to two parallel spectra, society and institutions. For any federation to function harmoniously, its position on the parallel spectra must be in harmony. However, if society's position on the spectra leans towards confederation, but the institutions are managed in a more centralized manner, then problems exist and society becomes restless and dissatisfied with the institutional status quo. A successful federation is one in which the various forces of society are respected by the citizens of that federation.

This concept is presented in Chart One. Since 1867 both the Canadian Constitution and Canadian society have tended to become more federal (A to B and C to D respectively). Frequently, the correlation between the two has been nearly equal (eg: 1931 Statute of Westminster). At other times there has been a sharp angle of deviation (eg: Z in 1949 - ending of appeals to the Privy Council and two constitutional amendments without provincial consent). Sharp angles of deviation and federal-provincial conflict go hand-in-hand. What is required is what J.A. Corry called "constitutional morality, the socio-economic forces which bind a federation together with those that demand decentralization".⁴

W.F. Livingston has pointed out to Canadians that:

"The most important principle upon which federalism rests is that of respect for opinions with which one disagrees. If policy making in a federal state is not guided by this idea, then there is little chance for the federation to endure. The moral basis of a federal state is much more important than its legal basis. In Canada this is reflected perhaps best of all in the problem of an amendment procedure."⁵

In discussing the failure of federalism in East Africa, the British West Indies, Central Africa and Malaysia with Singapore, Thomas M. Franck writes:

⁴ As quoted by J. Stefan Dupré: "Workability of Executive Federalism in Canada", in Herman Bakvis and William Chandler ed., *Federalism and the Role of the State*, Toronto, 1987, p. 252.

⁵ W.S. Livingston, *Federalism and Constitutional Change*, Oxford, 1956, p. 105.

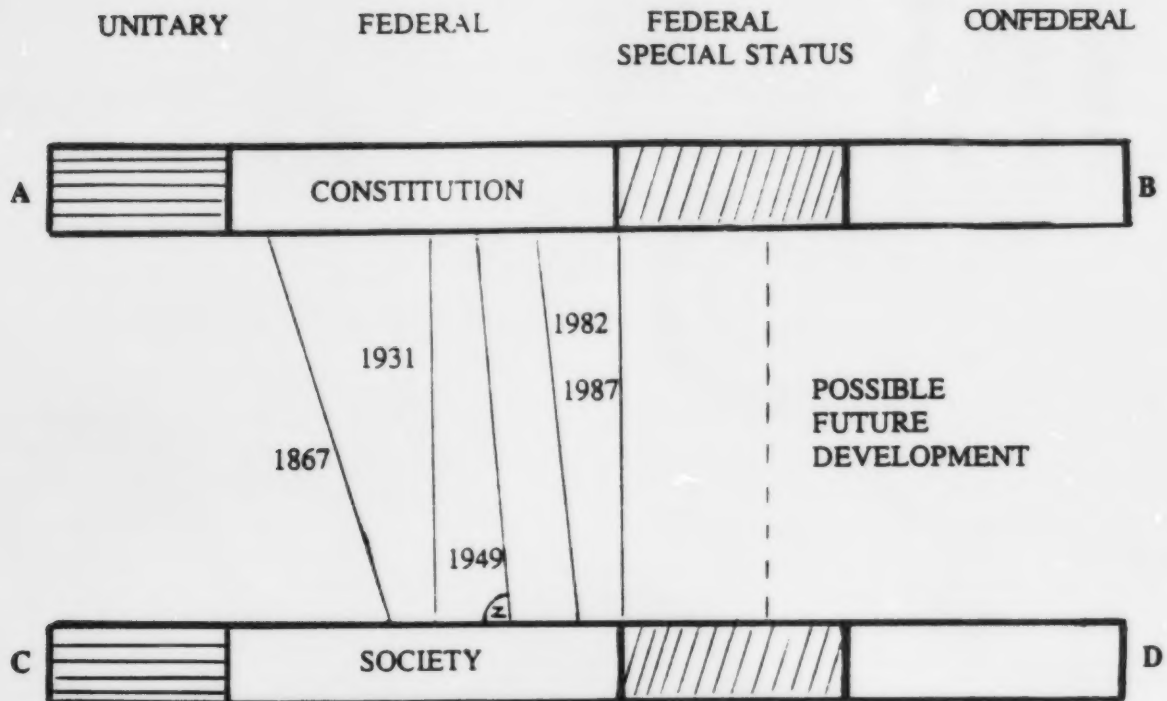
"The principal cause for failure, or partial failure of each of the federations studied ... can only be found in the absence of a sufficient political-ideological commitment (by society) to the primary concept or value of federation itself."⁶

One might add Yugoslavia and the Cameroons to Franck's list. It appears from an inspection of those federations which have failed that federalism will only succeed where there is a strong desire by the various segments of society to make the system work. Therefore, one must look first to the political culture and society of successful federations to ascertain why they continue to survive.

⁶ Thomas M. Franck ed., Why Federations Fail, New York, 1968, p. 177.

CHART ONE

THE SPECTRUM THEORY OF CANADIAN FEDERALISM



A - B REPRESENTS A SCALE OF CENTRALIZATION IN POLITICAL SYSTEMS FROM UNITARY TO CONFEDERATE

C - D REPRESENTS A SCALE OF SOCIAL TERRITORIAL INTEGRATION FROM INTEGRATED TO DIVERSE

The Swiss are the federation exhibiting the strongest pro-federal political culture. As Daniel Elazar points out:

"Their bearing and relationship to one another are manifestations of such a political culture, which is reflected in their music, art, (history) and literature as much as in their politics and in their constant civilization of balance of collegiality, of the involvement of the widest variety of groups in consultations surrounding discussions if not in actual decision making."⁷

The United States, following the Civil War, is another example, particularly its history, including folklore, and nationalism, of a nation exhibiting a pro-federation political culture.

It is interesting to note in passing, that these two successful federations are the only two which do not employ the British parliamentary system, or a comparable system as is the case in Germany. Perhaps, the Canadian experiment of fusing the Westminster model with federalism has not been all that successful in promoting a pro-federation social integration?

The question of national survival or fear of invasion has an impact on political culture. Germany from 1949-1990 is an example of a federation in which "national fear" helped to promote federalism. India and Austria are two other possible examples, though both have offsetting internal forces which somewhat dilute the "fear factor".

Malaysia, as it is presently constituted, is an example of a federation exhibiting internal fear. Malaysia is a federation composed of four racial groups: the Malay, Chinese, Indians, and the peoples of the two Borneo units. The Chinese are the economic leaders, while the Malays are the most numerous. The constitution is so structured so as to give the indigenous Malays greater political power than their numbers would warrant as they fear the economic power of the Chinese. The Chinese, on the other hand, fear political instability. The result is a pro-federation society.

Federalism may be imposed upon the state as was the case with Germany, Malaysia and Central Africa, or internally generated as was the situation in Switzerland, the United States, and to some degree, the West Indies. But as these examples illustrate, unless society is in favour of federalism, the system will fail.

Canadians must ask themselves whether their society is federal or confederal. It would be useless, as Franck has illustrated, to build institutions for a reformed federalism if in fact society's position on the spectra should be classified as confederal rather than federal.

Defence is another factor which like fear (indeed they go hand in hand) can promote a pro-federal society. Canada and the United States were early examples of this

⁷ Daniel J. Elazar, *Exploring Federalism*, Tuscaloosa, 1987, p. 192.

factor. Germany, India, and Malaysia are more recent examples. The removal of an external threat can dislodge one of the anchors of any federal union as we are now witnessing in Yugoslavia.

Another reason for federalism, which is associated with societal forces, is the question of economics. Australia is an example of a federation in which economic factors were important in the initial decision to form the federation. Economic arguments were also used in favour of the federation of Singapore with Malaysia, a federation which has now failed, though not for economic reasons as is discussed later. The uneven economic development of the West Indies was a factor in the failure of that federation.

Evidence elicited from those federations which have failed shows us that strong proximity economic factors are helpful in binding the federation together.

What the study of other federations illustrates is that the most important ingredient in any successful federation is society. For the federation to live, society must be in favour of the political compromises necessary for any federations to succeed. Failure to build on the structure of society and the prevailing political culture, would be like building on quicksand. Yugoslavia, Nigeria, Pakistan, the West Indies, Central Africa, and Malaysia with Singapore are all testimonies to this fact.

Recommendation: We commend the Government of Nova Scotia for the establishment of the Working Committee and encourage the legislators to consult constantly with Nova Scotians as the constitutional process unfolds so that the institutions which evolve will reflect the desires of society.

INSTITUTIONS

If, as was argued in the previous section, institutions should be built to reflect society and not the reverse, it may well be dangerous to contemplate importing institutions without first importing the society for which they were constructed. This would be a daunting task and not recommended. On the other hand, an examination of institutions found elsewhere may have a positive impact in that Canadians should not make the same mistakes.

In this section of the paper, we examine certain institutions which are to be found in other federations. We also examine the current reform proposals of the Government of Canada in a comparative context and make suggestions how Nova Scotia might strengthen these proposals.

A. The High Court

All federations, with the exception of Switzerland, have a system of judicial review with a High Court which acts as an umpire of the federal system. The adoption of the Charter by Canada in 1982 plus the use of "reference cases" has turned the Supreme Court into a virtual constitutional court at the expense of appeals arising through torts or the

criminal process. Canada, unlike India and the United States permits the Governor-in-Council to "refer" matters to the Supreme Court (the Provinces have a similar power). "Reference cases" can add to the workload of the Canadian court, in fact, many of the most significant court decisions (including those of the Privy Council) began as reference cases.

The Germans have overcome this problem by having two High Courts, one for constitutional cases, and one for all other appeals. In Germany, the Constitutional court has the authority to review the constitutionality of all legislation. It also acts as a mediator of disputes between the central government and the *länder*. The court is also empowered to protect the basic law (The Constitution) and the democratic principles of the state. The court only adjudicates issues of constitutional significance. As Russell Dalton points out: "The court is thus both a vital mechanism for conflict resolutions within the German system and an active protector of the System".⁸ Canadians might well follow this process, not only at the national level, but also in the larger provinces like Ontario. Such a reform could free up the heavy load the Charter has placed on the appeal courts.

Another question is the selection process of "the umpires". As the justices of any constitutional court are umpires, both levels of the federation should be involved in the appointment process. Obviously the units deserve a say in the appointment of Justices to the High Court, the question is how to do this without causing undue delay in the selection process. Although the processes found in both the Meech Lake Accord and the Victoria Charter (1971) were potentially cumbersome, they are a good starting point for discussion. The experiences of other federations are not particularly helpful in this area. Some, for example Australia, follow the current Canadian system, while others such as the United States, involve the Upper House.

Recommendation: We recommend that Nova Scotia advocate the division of the Supreme Court of Canada into two along the lines currently found in Germany. We also recommend Nova Scotia advocate an indirect provincial input into the selection or ratification of Justices to the new Constitutional High Court through the Senate as is discussed below.

B. Second Chambers

In virtually every federation, the federal legislature is composed of two houses due largely to the dual principles which must be protected in a federal system. On the one hand is the liberal democratic principle of one person, one vote; this is normally enshrined in the lower house where representation is based strictly on a population basis. The second principle, which is seemingly in collision with the first, is the federal principle that each state or province, irrespective of demographic weight or resources, is essentially equal or at least entitled to weighted representation in the federal government. In most federations the upper house is designed to incorporate this federal principle. Some also use the second chamber as a house of minority or charter group interests. Normally, this representative role entails the election of the upper house.

⁸ R.J. Dalton, *Politics: West Germany*, Glenview, p. 318. Also Gunter Kisker, "The West German Federal Constitutional Court", *Publius*, Vol. 19, 8. No. 4, Fall 1989, pp. 35-52.

In Canada the House of Commons is the directly elected house which entrenches the democratic principle. Here Ontario and Quebec dominate due to their population; the two provinces, with 174 of the 295 seats, have a majority in the lower house while Manitoba and Saskatchewan, for instance, have fewer MPs than the greater Toronto area and the four Atlantic provinces have a mere 32 seats. The Senate, with its equitable regional representation, was formed to counterbalance this central Canadian preponderance in the lower house, and thus be the central institution which would act as the protector of the federal principle. However, because of the Senate's appointive nature, it has always lacked legitimacy and has thus become a mere appendage of the centrally dominated lower house.

Canada is therefore unusual among federations in its lack of a "federalizing" upper house. The deficiency of provincial representation at the centre resulting from this lack of intra-state second chamber is exacerbated by other structural factors, most notably the use of the parliamentary-cabinet system of government. This form of government has been derived from, and is most appropriate to, a unitary state. Although it is used in other federations, such as Australia, these normally have an elected and effective federal upper house described above. In a cabinet system territorial interests, particularly those of the scantily populated peripheries, cannot take precedence. Even though the representative principle of cabinet selection normally ensures the presence of regional representatives in the executive, it does not follow that provincial interests regularly dominate or are even forcefully articulated in cabinet. Hence the unmodified cabinet model of government bereft of a counterbalancing provincial intra-state institution (such as a provincial house Senate) is fundamentally incongruous to a federal state which must by definition accommodate regional interests.

Partly as a result of this failure of the Senate as an intra-state central institution, Canadian politicians have increasingly turned to the inter-state mechanism of executive federalism. Western and Atlantic premiers in particular have used First Ministers Conferences, where the two regions constitute close to 80% of the membership, to highlight their regional concerns. Notwithstanding certain advantages resulting from the use of executive federalism (see below), many academics believe executive federalism has damaged Canadian unity by heightening ethnic and federal-provincial conflict; First Ministers Conferences are sometimes used as forums for "federal" and "Quebec" bashing by the other provinces. The use of executive federalism, whereby important decisions are being made outside the normal channels, has also resulted in the reduction of the power of, and damaged the legitimacy of, the House of Commons as a national representative institution. As a result many Canadians are now calling for a more fundamental reform which would reduce our reliance on this intra-state mechanism by institutionalizing inter-state federalism at the centre - Senate reform.

The demands for Senate reform, and more specifically the Triple E model - elected, effective and equal - started in British Columbia, and have now spread to Alberta, Saskatchewan, Manitoba and Newfoundland. There also seems to be increasing support for Senate reform in New Brunswick, Nova Scotia and Prince Edward Island. While many of these provinces' premiers had previously advocated retreating behind the bulwarks of the provincial government, during the 1980s they became convinced that this was only a partial line of defence since Ottawa would still exercise powers key to their interests such

as taxation, international trade, transportation, social policy and defence. The more comprehensive remedy would be a more regionally sensitive federal government. For most this meant a Triple E Senate.

As the federal government acknowledges, the pressure for Senate reform has become acute in recent years, particularly in the west and the Atlantic. While this is generally accepted, the major question now addressed is what form should this revised Senate take? More specifically should it be Triple E and, if it were, what would be the implications on parliamentary, responsible government? In answering these questions it is instructive to briefly examine upper houses already in operation elsewhere in federations: the German **Bundesrat**; the American Senate; and the Australian federal Senate. Once this study is complete, the federal proposals for a reformed upper house will be discussed and a recommended Nova Scotia position posited.

1. The German **Bundesrat**

The Council of States, or **Bundesrat**, has been of much interest to Canadians. Although there has been considerable debate as to whether Germany qualifies as a true federation (so centralized are many of its government and politics), the German upper house has many unique features relevant to the Canadian experience. The Council is composed of the state (Land) governments (cabinets), with civil servants often substituting for ministers, especially in detailed committee work. Membership does vary with the size of the state, but not proportionally. Voting is by state, **en bloc**, and the state delegates follow instructions from their state governments. The Council is a legislative body which has the power to initiate legislate, although it rarely does. It has three critical powers:

- (a) a suspensive veto on all legislation coming from the popularly elected chamber (the **Bundestag**);
- (b) an absolute veto on legislation affecting the states; and
- (c) equal power with the **Bundestag** in approving constitutional amendments and in electing members of the Constitutional Court.

With respect to the absolute veto, the power of the Council is substantial, but derives primarily from three other institutional sources, namely:

- (a) the division of powers, which is more functional than categorical and by which the federal government has very extensive legislative powers, has most federal laws administered by state governments. It is the responsibility of states to administer federal laws that justifies their participating in formulating them.
- (b) constitutional amendments, especially in the earlier years of the federation, by which the states approved new powers for the central government in return for a stronger role in the

formulation of federal legislation (i.e. yielding jurisdiction in return for enhanced power sharing).

- (c) the Constitutional Court, which ruled that the entirety of a statute is subject to veto by the Council if any part of it affects the states (consequently, some two-thirds of all legislation is subject to the absolute veto of the Council).

The possibility exists of a deadlock between the two chambers. Some observers think this possibility is increasing as Germany moves toward a two-party system and a form of responsible government. Thus far conflicts have been resolved by negotiation.

Although the German Council provides an interesting example of how to institutionalize provincial representation in central government, in a sense a formalization of executive federalism, it is not an appropriate role model for the elected Senate.

2. The United States Senate

While the U.S. provides the almost universal model of federalism, its applicability to the Canadian experience is limited due to its separation of powers/congressional model of government. Yet the Senate, a Triple E version based on equal representation from state constituencies rather than state governments, is perhaps more apropos to the Canadian discussion than is the German Council. Since 1913, by constitutional amendment, American Senators are directly elected, albeit by state-wide constituencies. Prior to this, the election of the Senate was more like the German model (but not identical) - indirect election by the state legislatures to represent the state governments. Now the Senators represent state interests, but not necessarily state governments, at the centre. Hence the Senate is an instrument of intra-state federalism operating in a vibrant legislative process in which state interests are represented, and regional trade-offs made, within a national institution. Yet this vitality is largely the product of the separation of powers, the separate election of the President and the localized party system. The Canadian responsible government system precludes such a free-wheeling legislative body.

Although the American Senate is useful as an example of intra-state federalism, the fact that the U.S. system of government is so very different from the Canadian - the separation of powers versus the fusion of powers, fixed term of presidency versus collective responsibility - limits its appropriateness from a Canadian perspective.

3. The Australian Senate

It was evident to the Founding Fathers, especially those from the smaller states, that the larger, more industrialized eastern states, by virtue of their population, would dominate the House of Representatives, the lower house organized on the representation by population principle. In an attempt to counterbalance this dominance and to enshrine the federal principle in the central government, the Senate was established with an equal number of Senators from each state, regardless of population size. Its main role was expected to be that of guardian of states' rights. It was given equal stature with the House

of Representatives in Section 53 of the constitution. The only limit placed on the Senate was that it could not originate money bills or impose taxation. Most constitutional experts believe however that the upper house does have the power to defer or reject money bills.

This seemingly raises the question of power without responsibility. But the Australian constitution also entrenches a mechanism known as double dissolution to deal with deadlock between the two houses, a mechanism which holds the upper house responsible for its actions. Section 57 states:

If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

The Senate did not live up to the expectations that it would be a strong and regionalizing force. In the years following federation it increasingly became a "yes" house to the more powerful House of Representatives. In particular, it failed in its role as protector of states' rights as it became increasingly dominated by highly disciplined political parties. Loyalty to party line took precedence over loyalty to state. Post-1949 however two reforms were introduced which led to a resurgence of the Senate. First, a proportional representation (PR) electoral system known as single transferable vote (STV) was adopted for Senate elections. This had the effect of enhancing minor parties' and independents' chances of election and lessening the likelihood of the government majority in the House of Representatives also dominating the Senate. The second reform, introduced in the 1970s, was the creation of an extensive committee system in the upper house. This allowed the Senators to develop expertise in particular policy areas thus enabling them to become more effective critics of the government.

As a consequence of these reforms, the Senate became a more active, effective house, essentially replacing the official opposition in the House of Representatives as the most forceful check on the government. Yet even though this rejuvenated Senate has played a more active role in national politics, it has not acted as a states' house. It must be remembered however that Australia is a more centralized, homogeneous, less regionalized country; the Senate's failure as a states' house would not necessarily be duplicated in more diverse, decentralized Canada **even if the same Senate model were used**. The Australian Senate, largely due to the PR electoral system, has increasingly become a house of minorities and interest groups. Thus the divisions represented there are not primarily the regional ones but rather (remembering of course the still strong partisan interests) more fundamental societal divisions, based, for example, on the interests of Aborigines, women's groups and environmentalists.

This is of import for Canadians. In this country many people, especially in "outer Canada", advocate an elected, effective and equal Senate as a means of strengthening the provinces input at the centre. Perhaps what would be more beneficial, given the strong centrifugal forces in Canadian federalism, would be an upper house similar to the Australian model in terms of its minority representation. In a sense this would be a unifying force, for rather than emphasizing current regional divisions the Senate would represent cleavages which cut across regional lines.

The Australian Triple E Senate provides the best model for a reformed Canadian Senate. Australia is a parliamentary federal democracy and the Senate is an example of intra-state rather than inter-state federalism. Also of interest is the fact that the Australian upper house, due to its PR electoral system, has to a limited extent become a house of minorities. One element of the Australian model which should not be duplicated in Canada is the dominance of party loyalties over state representation in the Senate. Although the Australian constitution is commended for its inclusion of a deadlock breaking mechanism, Canadians should be wary of the potential for "power without responsibility".

4. "Shaping Canada's Future Together"

The federal government acknowledges that the *status quo* of federal appointments to the Senate cannot continue. Reform, not abolition, is their answer. What they propose is not Triple E but rather an elected, equitable and supposedly more effective upper house. Beyond these broad parameters however, the federal package is vague. This lack of particulars hampers conjectures as to whether or not the Senate proposed will be good for Nova Scotia. Despite the ambiguities, certain preliminary observations will be made.

4.1 Equal or "Equitable"?

The "small" provinces of "outer Canada" argue forcefully for equal representation from each province. In the forefront of this support for equal are the western premiers and western research foundations such as Canada West. According to Albertan academic Roger Gibbins while Senate reform will be the "symbolic key" that western Canadians will use to unlock the federal government's complex constitutional proposals, the acceptability of any Senate reform package to the west will depend on this still as yet undefined E - equal.⁹ The federal proposals state that while the specific distribution of seats in the Senate will be left to a Special Joint Committee of Parliament, the principle Ottawa supports is "much more equitable provincial and territorial representation than at present"¹⁰. It is likely that Nova Scotia would lose ground under such a principle. Nova Scotia's present 10 Senator allotment could be categorized as over representation when compared to British Columbia's and Alberta's six.

⁹ Roger Gibbins, "2 1/2 Es May Not Be Enough", *Globe and Mail*, September, 1991.

¹⁰ Canada, *Shaping Canada's Future Together: Proposals*, Ottawa: Minister of Supply and Services, 1991, p. 53.

The Nova Scotia government should recognize then that even "equal" is a lessening of the province's current level of representation in the Senate. The province should therefore start negotiations by arguing for equal but, given Quebec's and Ontario's opposition to the equal principle, accept that equitable might be the most that can be achieved here.

4.2 Effective?

The federal proposal has been described as a 2 1/2 E version (meaning elected, effective and equitable). But whether or not it warrants a full "E" for effectiveness is open to question. Once again the package is short on detail. Even though it states that "as a general rule, in order for measures to become law, approval of both the Senate and House of Commons should be required", it also declares that the lower House will "remain the primary legislative body" and that "since the Senate is not a confidence chamber, the Senate would have no legislative role in relation to appropriation bills and measures to raise funds including borrowing authority."¹¹ We infer from this that the Senate would not be able to initiate legislation. Furthermore, the Senate would only have a six month suspensive veto on all matters of "national importance"; how broadly this will be interpreted is still unknown. On the whole there appears to be a major difference of opinion as to how effective this Senate would be. Joe Clark, for instance, claims that it would be a strong, regional force. It is our opinion that, given the proposed Senate's inability to deal with money bills and the seeming ban on it initiating legislation, the new upper house would be a rather ineffectual body which would merely give the impression of enhanced provincial input in central decision-making.

4.3 Elected

While it is clear in the federal package that the new Senate would be elected, the electoral system is yet to be determined. The electoral system chosen will directly impact on the role the Senate will play be it party house, provincial house or minority house. For instance, were the Special Joint Committee of Parliament to choose a duplication of the electoral system used in the lower house, a plurality single member constituency system, and were the Senate elections to track the Commons elections, this would increase the likelihood that the upper house would become a party house of similar, but not identical given the Canadian schizophrenic voting behaviour, partisan makeup. This would defeat the purpose of Senate reform. Hence it is necessary to examine what role the Senate should play and what electoral system would best suit this objective.

The federal paper states that "the impetus for Senate reform stems first and foremost from the conviction ... that federal decision-making is not sufficiently responsive to regional diversity"¹² hence the need for a house of provincial constituencies. Given the Supreme Court's importance as interpreter of the constitution, if the Senate is to be an effective

¹¹ Ibid, pp. 53-54.

¹² Ibid, p. 17.

house of the provinces it should confirm appointments to the Court. In order to be confirmed the federal common law appointments would need a simple majority in the Senate. For the three civil law justices, a double majority would be needed: a majority of the Senate and a majority of Quebec Senators. Another provincializing mechanism would be to have Senate elections track provincial rather than federal elections. This could have a number of added benefits such as discouraging the use of provincial elections as a protest grounds for federal policies and governments. All too often in the 1970s and 1980s the major theme of provincial election campaigns was the federal government's, rather than the provincial government's, performance; Peter Lougheed for example was elected time and time again on a federal-bashing theme. By providing the provincial electorate with a proper channel for expressing regional concerns to Ottawa in the same election, provincial politicians would be free to concentrate on provincial affairs.

The proposals also state that the electoral system chosen should "give expression to the social diversity of the Canadian population, keeping in mind the history of the inadequate political representation of women, Aboriginal peoples and ethnic groups"¹³, suggesting that it also become a house of Charter groups. In this regard it would be similar to the Australian upper house. It is hoped that, as in Australia, this new upper house, by representing cleavages which cut across regional lines, would not be centrifugal force. Although this second role, a minority house, is one which we support, we also find it ironic that Ottawa should mandate this elected Senate to try to become more culturally, ethnically and gender representative of Canada when both Liberal and Conservative federal governments have done little in this regard themselves. Given the appointive nature of the present Senate there is no excuse for this lack of representativeness in the upper house. As in Australia, a PR electoral system would be needed to aid the election of minorities and women. Although the STV system used there would be adequate, the province should consider another PR system - non-transferable vote. In the Australian STV system voters are obliged to rank order every candidate thus forcing them to vote perhaps for bottom preferences whom, if given the choice, they would not vote for at all. The NTV system allows voters to vote for anywhere from one to all candidates. This gives the voter the freedom to weight her/his vote by concentrating it on only one or a few candidates. This often helps the election of minorities; supporters back their interest exclusively. A number of guaranteed Aboriginal seats, like the four separate Maori seats in the New Zealand House of Representatives, would also help the Senate become a charter house.

Recommendations:

1. The Nova Scotia government should promote a Triple E Senate. While elected and effective should not be negotiable, it should be recognized that we may have to settle for equitable. But the starting position must be equal.

¹³ Ibid, p. 18.

2. This upper house should have a triple role:
 - a check on the centrally dominated House of Commons
 - a house of the provinces
 - a "charter group" house.
3. In order to be an effective check on the House of Commons while at the same time avoiding the problem of power without responsibility, we advocate an across the board one year suspensive veto on all legislation, excluding money and appropriation bills and measures to raise funds through taxation where the veto should be 90 days. But the Senate would not be a confidence house.
4. The electoral system adopted should be a PR system which aids rather than hinders, the election of minorities and women. We recommend the non-transferable vote. This allows voters the option of either ranking all candidates or, if they prefer, voting for any number of candidates thus weighting their vote for their strongest preferences.
5. To encourage the provincial nature of the house, Senate elections should track provincial elections. It is hoped this will have the effect of reducing federal- bashing provincial election strategies.
6. We recommend that the Senate confirm Supreme Court appointments, by simple majority in the case of the common law justices, and double majority for civil law justices.
7. We recommend, see below, that the Council of the Federation be scrapped in light of the above Senate proposals.

THE DIVISION OF POWERS

The federal proposals contain both centralizing and decentralizing features, with the centralizing features predominating. This was the conclusion reached by Dr. Jennifer Smith in a recent article¹⁴, and it is one with which we agree. Proposals affecting the division of powers come in two categories: a collection of specific items in relation to which the legislative authority of the provinces would be confirmed or enhanced, and a massive thrust in the direction of increased federal authority over the economy. A few comments on each of the federal proposals in this regard may be useful.

First, the federal government proposes to tidy up the constitution by eliminating the so-called declaratory power contained in Section 92(10)(c), and by recognizing explicitly a provincial residual power over non-national matters not covered by the Peace, Order and Good Government clause. These proposals are likely to be of little consequence, since the declaratory power has long since been abandoned as a realistic policy instrument, while

¹⁴ Jennifer Smith, "The Division of Powers", *The Network*, Vol. 1, No. 5 (October 1991), pp. 11-12.

the courts have long since confirmed much the same provincial residual power as is here proposed. There is no particular lesson to be drawn from comparative experience in this regard, since federations vary with respect to the location of residual legislative power and, in any case, the actual working of federations in the face of judicial review seldom conforms to the precise wording of the constitution.

Second, the federal government proposes to curtail its use of the spending power in two respects. On the one hand, any future national shared-cost program would require the approval of at least 7 provinces with 50% of the population. On the other hand, the federal government would withdraw from several fields in which it is already involved, namely: tourism, forestry, mining, recreation, housing and municipal/urban affairs. The former is similar to a provision in the Meech Lake Accord and appears to be entirely reasonable. The latter is not proposed as a constitutional amendment, but simply as a matter of federal policy. As such, it presumably has more to do with expenditure restraint than with federalism per se, although the financial consequences for a province like Nova Scotia could be serious indeed. Again, comparative experience provides no guidance here. We know of no cases where the federal spending power has been attenuated in the manner here proposed, except possibly in Germany where an entirely different federal arrangement applies. Expenditure restraint, on the other hand, is not limited to federal governments.

Third, federal proposals would provide for enhanced provincial involvement in culture and broadcasting, as individual provinces might negotiate, with the proviso that provincial broadcasting services would be subject to federal regulation. Provincial participation in immigration would be handled as in the Meech Lake Accord, with provision for the constitutionalization of federal-provincial agreements. Nothing here attracts comparative comment.

Fourth, the federal government would amend the constitution to recognize manpower training as an area of exclusive provincial jurisdiction. This would put to rest an intergovernmental disagreement dating from 1967 and the federal legislative initiative which sought to draw a distinction between "training" and "education" and thereby to claim for the federal government jurisdiction over the occupational training of adults already in the labour force. This is an expensive program area, and a province such as Nova Scotia will surely wish to pursue the question of accompanying fiscal compensation. Moreover, full provincial responsibility would raise new problems in the application of national labour market information to local and provincial training programs. Nonetheless, given that labour markets tend to be local, there is much to commend this proposal.¹⁵ At the same time, some other federations have been moving in the opposite direction. Australia, for example, has recently consolidated its technical training institutes and colleges with its universities under federal legislation and funding.

¹⁵ A somewhat similar proposal was made in 1973 by J.S. Dupré, et al, in *Federalism and Policy Development: The Case of Adult Occupational Training in Ontario*. Toronto: University of Toronto Press, 1973, pp. 227-38. Significantly, that study suggested that some provinces might well prefer a continuing role for the federal government, which might be accommodated through contractual arrangements like those employed in the purchase of police services. The interdelegation proposal could offer another route to a similar accommodation.

Fifth, the federal government proposes to amend the constitution to provide for a form of interdelegation: a proposition whereby the federal government or a province might shift legislative responsibilities from one to the other. The details of just how this might work, including the possibility of revoking such delegation, are not spelled out. Maritime provincial governments have long been interested in this possibility, and will no doubt want to pursue it vigorously. Not only could it resolve the original problem of coordinating federal and provincial efforts in relation to labour legislation¹⁶ and the marketing of agricultural products, but it might also pave the way for the rationalization of jurisdiction over the fishery. This proposal holds considerable promise of greatly increased flexibility in Canada's constitutional division of powers, fostering degrees of asymmetry appropriate to different regional and provincial circumstances.

It is important at this point to note one proposal that is not included in the federal package. This would be a strengthened commitment to interprovincial equalization. Indeed, the federal document states explicitly that Section 36 of **The Constitution Act, 1982** is one of the many elements of the Canadian federation that need not be changed. We are not convinced of this. The existing provision is rather vague, and while it may preserve the constitutional sanctity of the principle of equalization, it does not secure any particular approach to, or level of, equalization payments. Nova Scotia may well want to seek such security. If so, it will want to consider the German arrangement, whereby equalization is not only firmly embedded in the constitution, but takes the form of transfers between provinces (Länder) as opposed to federal expenditures.¹⁷ Indeed, the German system invites consideration of the possibility that an integration of the federal GST with provincial retail sales taxes might create the opportunity to explore an approach to equalization involving contributions to an interprovincial fund as opposed to purely federal taxes and expenditures. Of course, any such "fraternal" approach is especially difficult in a situation in which both orders of government are in chronic deficit positions.

Finally, the federal government also proposes a massive centralization of power over the economy. The proposal comes in two parts. First, Section 121 would be strengthened by prohibiting all barriers to the mobility of persons, capital, services, and goods. The only exceptions would be those justified by reason of national interest, regional development or equalization. Nova Scotia will likely want to be assured that the references to regional development and equalization are given firm and adequate expression in any amendment to the constitution, but otherwise we can only applaud efforts to promote national economic integration.

It is the second part of the economic centralization that is cause for major concern. In it, the federal government would be armed with a vast new power "to make laws for the

¹⁶ This was the substance of the issue which led to the "Interdelegation" case in 1951 in which the Supreme Court declared invalid Nova Scotia legislation that provided for the delegation of provincial legislative authority to the federal parliament and vice versa. See Peter H. Russell, et al, Federalism and the Charter, Ottawa: Carleton University Press, 1989, pp. 581-5.

¹⁷ For a succinct account of the provisions of Germany's equalization scheme, see Herman Bakvis and Bernard Hibbitts, "Equalization: The West German Alternative", Policy Options, May/June, 1982, pp. 25-31. See also Rudiger Voigt, "Financing the German Federal System in the 1980s", Publius, Vol. 19 (Fall 1989), pp. 99-113.

efficient functioning of the economic union."¹⁸ In passing specific legislation under this provision, the federal government would be constrained by the need to obtain the approval of 7 provincial governments with 50% of the population. Dissenting provinces could opt out of the legislation for three years, a provision that might or might not be renewable (advice on this is to be sought from the Special Joint Committee) and would require an extraordinary legislative majority (60%).

The federal proposal would constitute a new and additional amending formula, one in which provincial consent to federal legislation in an area of exclusive provincial jurisdiction would constitute an amendment to the constitution. The proposal would have very wide potential application, since it would encompass anything deemed to promote the efficient functioning of the economic union.

The same ends could be obtained without the economic override, under the existing general amending formula.¹⁹ The difference is that under existing provisions, the federal government must obtain a constitutional amendment before legislating outside of its existing jurisdiction, and such an amendment must be approved by at least 7 provincial legislatures, as opposed to governments.

This federal proposal may appear on the surface to resemble certain principles of the German federal constitution, whereby the federal government has broad powers to pass framework laws setting national standards, which are then administered by provincial (Land) governments under their own authority. This functional interdependence is also reflected in the composition and powers of the **Bundesrat**, a house of the provinces which must approve federal legislation that has an intergovernmental dimension. The resemblance is superficial, however. The functional interdependence that is fundamental to German federalism is not proposed for Canada. Rather, what is proposed is a device by which economic powers could be centralized on the initiative of the federal government and by means of executive agreements that would be constitutionally binding and, presumably, irreversible except by further constitutional amendment.

Whatever the economic benefits implicit in this proposal, and we leave to economists an evaluation of what they may be, we advise that it be approached with great caution. The interests of Nova Scotia do not appear to be very well protected in its current formulation. Indeed, we question the need for such a provision at all, given that the proposed ends can all be achieved by means readily available under the current constitution.

The federal proposal for an economic override joins several other proposals in their reliance on a proposed new institution, the Council of the Federation. This Council would certainly have a significant effect on intergovernmental relations in Canada and, because of this, warrants further consideration under that heading.

¹⁸ Canada, Shaping Canada's Future Together: Proposals, Ottawa: Minister of Supply and Services, 1991, pp. 30-31.

¹⁹ To a point, the same ends could also be served by the proposed interdelegation provision.

INTERGOVERNMENTAL RELATIONS

The proposed Council of the Federation has much in common with the German **Bundesrat**. Like the **Bundesrat**, it would be a formal body, entrenched in the Constitution, comprising delegates of the federal and provincial governments who would speak and vote as directed by their governments, each delegation voting *en bloc*. Unlike the **Bundesrat**, however, each government delegation would have a single, and therefore equal, vote. Also unlike the **Bundesrat**, the Council would have no staff and no permanent headquarters of its own, but would meet as required in existing federal or provincial facilities. It would be, at one and the same time, a third (upper upper?) house of the federal legislature and a continuing federal-provincial conference. As such its creation would be something akin to stacking a truncated German **Bundesrat** on top of an emasculated Australian Senate!

The stated purpose of the Council is to serve as a forum for discussion and decision in three specific areas. These are:

- (1) federal legislation under the proposed economic override;
- (2) proposed guidelines for the coordination of fiscal policies and the harmonization of fiscal policies with the federal government's monetary policy; and
- (3) federal proposals to initiate new, national shared-cost or conditional grant programs in areas of exclusive provincial jurisdiction.

Two reasons are offered for the establishment of the Council. First, it is claimed that the existing network of intergovernmental consultation "...has not proven to be an effective mechanism of collaboration - there are no decision-making rules and there is no formal process of consultations."²⁰ No evidence is presented to support the assertion that existing arrangements are ineffective. And while many would agree that improvements are possible, it is disingenuous in the extreme to suggest that executive federalism is ineffective because of the absence of decision-making rules and formal procedures.²¹ Indeed, it can be argued with at least as much veracity that the proposed formalization is the very condition most likely to weaken meaningful consultation and collaboration. The hallmark of executive federalism in Canada has been its flexibility and its reliance on consensus. And while the principle of consensus has at times been abused, as in the final negotiations leading up to the 1981 constitutional accord, the substitution of a formal voting arrangement is fraught with potential difficulties.

The second reason offered for the creation of a Council of the Federation is that the closed nature of many intergovernmental discussions has attracted public criticism. Yet

²⁰ Canada, *Proposals*, p. 41.

²¹ For a perceptive and prescriptive analysis of the workings of federal-provincial executive relations, see J. Stefan Dupré, "The Workability of Executive Federalism in Canada", in Herman Bakvis and William M. Chandler, eds., *Federalism and the Role of the State*, Toronto: University of Toronto Press, 1987, pp. 236-58.

nowhere does the federal proposal consider either the reasons for closed meetings or the implications of open negotiations. Meetings are normally closed for precisely the same reason that cabinet meetings are closed. In a system of responsible government, the formulation of policies for which the cabinet will necessarily accept collective responsibility requires a degree of frankness in the consideration of options and the assessment of consequences that is possible only under strict rules of secrecy and confidentiality. Intergovernmental consultations and negotiations between federal and provincial cabinet ministers (including first ministers) and their senior officials demand similar conditions, if such consultations and negotiations are to be part of the policy formulation process. The implications of this for the proposed Council seem clear: if its deliberations are to be open, then those deliberations will almost certainly reflect positions previously taken by the participating governments. Will that facilitate collaboration? Or will it not simply invite closed discussions to continue, but outside formal Council meetings?

There are two additional problems with the Council of the Federation as currently proposed. As was previously intimated, the Council seems destined to function as a legislative body, despite protestations to the contrary in the federal proposal. How can a body which enjoys constitutional recognition, and which meets formally to debate and vote on proposed federal legislation be construed as anything but "another layer of government"?²² And with that, the question of its relationship with the proposed Senate and the House of Commons is surely begged. Will legislation coming before the Council already have the approval of both Commons and Senate? Or, because such legislation would normally affect "appropriation bills and measures to raise funds,"²³ would the federal government have an element of choice as to which second chamber - Senate or Council - would consider legislation after its passage in the Commons. Yet a third possibility can be read into the proposal. Since the wording of the proposed economic override indicates that "federal legislation under this new power could not be enacted without the approval of" the Council, could it be intended that debate and voting in the Council would precede consideration by the Commons? One way or the other, Canada seems destined under this proposal to end up with a tricameral federal legislature. And what would that do to the conventions of parliamentary government?

The second additional problem has to do with the proposed voting procedure. The principle of 7 provinces representing 50% of the population is, of course, taken from the general amending formula. This principle would imply a major departure in federal-provincial relations if applied to decision-making within the proposed Council, or even without the Council, as the formal definition of "consensus". It would mean that a major restructuring of economic powers might proceed despite the opposition of three provinces. A matter of vital interest to the Maritime provinces, for example, could proceed without the approval of their governments. Opting out, it will be recalled, might last for as little as three years. Moreover, before a province could opt out, it would have to pass a resolution with at least 60% support in its legislative assembly. What would that imply

²² Canada, *Proposals*, p. 42.

²³ The proposed Senate would have no role in relation to these matters. (See *Ibid.*, p. 20).

with respect to the confidence convention in a province whose government commanded the support of less than 60% of the members of the assembly?

Recommendation: We believe that the proposal for a Council of the Federation should be rejected by Nova Scotia. Not only would it complicate the federal legislative process, but its excessive formality and rigidity might actually impede intergovernmental collaboration. If there should be a need for the formal registration of provincial approval of federal initiatives, then this could be handled just as well by means of orders-in-council or, indeed, by resolutions passed by provincial legislatures as in the present constitutional amending procedures.

We also believe that more consideration should be given to the potential for inter-provincial collaboration in achieving national standards in areas of provincial jurisdiction. Experience in both the United States and Germany with respect to inter-state compacts and similar arrangements warrants further and serious consideration.

ASYMMETRICAL FEDERALISM: DIVISION OF POWERS

The question of symmetry versus asymmetry is found in many federations: examples include the American and Australian senates as opposed to the German and Austrian models. However, in most instances, each unit has the same constitutional authority within the constitutional framework of the federation - that is to say all federations have the same constitutional powers. There has, however, been one notable exception to this situation; that was the federation of Malaysia with Singapore.

In return for greater constitutional authority than that enjoyed by the other units, Singapore had fewer seats in the Lower House of the federal parliament than it would have received if the national representation formula had been applied: specifically, 9.3% of the seats were given to Singapore which had 16.7% of the total population of the then federation.

Today, the states of Sabah and Sarawak in Malaysia have a slightly different constitutional situation than is to be found in the other units.²⁴

That the Singapore experiment did not work should not be seen as a reason for failure to re-examine the Malaysian situation. The major reason for the divorce was racial politics,²⁵ and the fear that the Malays place in the federation would not be secure if the Chinese in Malaya and Singapore voted together as one.

There are lessons we can learn from Malaysia. It is true that asymmetrical solutions have their problems and could only be adopted with the consent and goodwill of all ten

²⁴ Federal Constitution Malaysia, Kuala Lumpur, 1986, Article 95, pp. 80-81.

²⁵ For details see Ursula K. Hicks, Federalism Failure and Success: A Comparative Study, London, 1978, pp. 67-75. Also R.K. Vasil: Politics in a Plural Society, Kuala Lumpur, 1971, p. 296.

provinces. But, asymmetry is a fact of constitutional life in Canada, and has been since 1867. Quebec is constitutionally a province unlike the others. Furthermore, Quebec is a distinct society and has been since 1774.

The Malaysian experiment shows that asymmetry could be a solution in the Canadian situation. Certainly, other more conservative proposals should be attempted first, but Nova Scotia should not reject out of hand the example of Malaysian asymmetry. It would be a far better solution than an independent Quebec.

CONSTITUTIONAL AMENDMENT

"A federation" wrote Lester B. Pearson, "is ... a delicate balance between conflicting considerations and interests. It is to be expected that the most delicate of all questions should be the way in which such a balance might be altered."²⁶

Amendment procedures in contemporary federations might be compared to athletic teams: some teams look very good on paper prior to the start of the season, but when competition begins they are frightful. Other teams prove the experts wrong and instead of being also-rans are found in the first division. So it is with amending formulae. Take for instance the Australian process.

On paper it looks like a sensible workable formula, not overly restrictive, yet one which safeguards the rights of the states. In actual fact, events have shown that the Australian constitution is virtually impossible to amend. The party system in the early days of Indian independence made that federation's constitution far too easy to amend in spite of the safeguards built into the constitution.

²⁶ L.B. Pearson, The White Paper on the Amendment of the Constitution of Canada, Ottawa, 1965, p. vii.

TABLE 1

Constitutional Amendment in other Federations

Australia (1901):

All articles are amendable by the one procedure. Proposals: must originate in Parliament and be passed by an absolute majority of each House. In exceptional cases, rejection by one House will not prevent ratification from being sought. Ratification: by referendum. Any change must be approved by a majority of the electors voting in a majority of states and also by a total majority of all the electors voting. Proposals for constitutional changes cannot originate otherwise than in the Commonwealth Parliament.

Austria (1920 & 1945):

Similar to Germany, though all sections may be amended. Proposed and adopted by 2/3 of the Lower House, unless 1/3 of either House demands a nation-wide referendum. Referendum is needed for any major constitutional revision such as the return of the monarchy.

Federal Republic of Germany (1949):

All provisions of the constitution may be amended by the one procedure; except for the following articles which are not amendable under the 1949 Constitution (the Basic Law). These are: the Division of the Federation into Laender (units), the principle of participation of the Laender in legislation through the Bundesrat, Article 1 of the Basic Law and Article 20 concerning the basic individual rights of citizens and the democratic origin and the limitation of state authority are not amendable. Constitutional Amendments require a two-thirds majority in both the Bundestag (Lower House) and the Bundesrat (Upper House) where the units are represented. The unit assemblies play no formal part in the amendment procedure.

Switzerland (1874):

All changes in the Swiss Constitution follow the one procedure which centres around compulsory constitutional referenda. A constitutional amendment may be proposed and/or initiated by either House of the Federal Parliament, the federal executive, a Canton, or 50,000 voters. These proposals may involve total or partial revision. However, no matter what form the initiative takes no amendment can become law until it has been approved by a majority of voters in a majority of Cantons (units) by means of a referendum.

United States of America (1787):

All sections of the American Constitution may be amended in one of two ways, though in practice the second method has never been fully used. Initiation rests with the two Houses of the Congress where an affirmative vote of two-thirds of those present and voting in each House is required. Congress must call a convention upon the application of the legislatures of two-thirds of the states to deal with an amendment proposed by the states. Such a convention has never been held. The Congress has always formally initiated all the amendments by legislation. The power to initiate by legislation rests with the Congress. Ratification is by the states, but the Congress may prescribe how such ratification is to take place. Ratification is by three-quarters of the states, either by legislation or by a convention specially constituted to approve an amendment. Only the 21st Amendment - the repeal of prohibition was the convention used - the other 25 amendments have been ratified by the State Legislatures. It has now become the practice for Congress to demand that ratification must be completed within seven years from the date Congress passed the amendment. This is not a constitutional provision - but it may be becoming a constitutional convention. No state may be deprived of its two federal senators without its approval, this is the only specifically entrenched clause in the American Constitution.

The study of other amending formulae illustrate that no single procedure can guarantee success. Each federation must build the process which best suits its own situation. No formula will be successful unless there is goodwill and respect on all sides as is exemplified by Switzerland.

There are two Canadian precedents which deserve to be reexamined, for both are an improvement on that to be found in the 1982 Constitution Act.

The first is the Victoria Formula of 1971. This proposal could be adjusted to remove the 50% population clause which is currently found in the Western provincial section. The 25% Clause would give Quebec the protection that province desires and, indeed, deserves.

The second procedure is that found in the Fulton-Favreau formula of 1964. That process was rejected by Quebec because of the mood in that province in the 1960s. It is doubtful if it would be rejected today. The major change which should be made to the 1964 formula is to permit one on one delegation, instead of the rule of four provinces. Delegation is required in the Fulton-Favreau formula to overcome the inflexibility of the amending process.

Recommendation: We recommend that Nova Scotia give serious study to both the 1964 and 1971 formulae. Either one of these would give Quebec its desired "veto", yet at the same time, provide sufficient flexibility if one on one delegation is permitted in Fulton-Favreau.

CONCLUSION

This report has studied various aspects of contemporary interdependent federalism. What it illustrates is that each federation is sui generis and each has to work out its own problems based upon society, history and economics.

The government of Nova Scotia would be well advised to follow the advice of W.S. Livingston quoted earlier in the paper, because no federation can stand still, and those which do will falter.²⁷ The successful federation is the one which faces its centrifugal forces boldly, with an open mind, and with a view to the protection of its minorities. Canada has a choice of following the Swiss or the Yugoslavian example; we hope that they will opt for Switzerland.

Nova Scotia must play its part in this process, for, as examples from those federations which have failed illustrate, if all the units do not strive for compromise - the results are catastrophic as Nigeria discovered in its bloody civil war.

Michel Vastel in Bourassa, has written: "... the Meech Lake saga in the Maritime provinces was punctuated by all that is disgraceful in politics: cowardice, tactical blunders, misunderstandings, and cheap shots."²⁸ Nova Scotia cannot afford to see the events of 1990 repeated in 1992.

²⁷ See Note 5

²⁸ Michel Vastel, Bourassa, Toronto, 1991, p. 151.

APPENDICES

APPENDIX I

TERMS OF REFERENCE FOR THE ADVISORY COMMITTEES ON THE CONSTITUTION

General Mandate

- I. The Government will establish Advisory Committees of resource persons of recognized expertise in the following areas:
 - Aboriginal Issues
 - Charter of Rights, Women's, Bilingual and Multicultural Issues
 - Government Structure and the Division of Powers
 - Economic Issues
 - Constitutional Process, e. g., amending process
 - Comparative Federalism
2. The Advisory Committees shall develop reports on acceptable options for a Nova Scotian position in their areas, so as to provide advice to the Working Committee on the Constitution and the Department of Intergovernmental Affairs.
3. The Advisory Committees' reports shall be made available to the Working Committee on the Constitution for its information and consideration. The Advisory Committee reports will be made public after the Working Committee report.
4. The Advisory Committees may present testimony before the Working Committee, as requested.
5. The Advisory Committees shall be established as advisory committees to the Department of Intergovernmental Affairs, and shall liaise with Intergovernmental Affairs through designated officials. The Advisory Committee reports shall be made available to Intergovernmental Affairs as well as to the Working Committee on the Constitution.
6. In the course of its researches, an Advisory Committee may meet with members of the other Advisory Committees and other relevant groups to explore particular ideas in depth.

Specific Mandates

7. Aboriginal Issues

To develop a range of realistic options for a Nova Scotian position on the Constitution which would accommodate the concerns of the Mi'kmaq people of Nova Scotia, while taking into account the Constitutional concerns of the aboriginal people in Canada as a whole.

8. Charter of Rights, Women's, Bilingual and Multicultural Issues

To consider the Canadian Constitution to determine whether opportunities exist for the better protection of human rights under the Constitution and, if so, to develop realistic options for the Constitutional protection of human rights. The Committee is directed to consider general human rights as well as, without being exclusive, specific concerns related to:

- official languages;
- the status of women;
- multicultural rights;
- the rights of disabled persons; and
- property rights.

9. Government Structure and the Division of Powers

To consider the Canadian Constitution to determine whether opportunities exist for:

(a) more efficient and effective provision of governmental services to the people of Nova Scotia and Canada as a whole;

(b) better coordination between the levels of government; and

(c) more effective representation of the concerns of Nova Scotia and Atlantic Canada in Ottawa; and

if so, to develop realistic options for a restructuring of the institutions of federalism and a rearrangement of the powers and/or functions of the central and Provincial governments.

10. Economic and Fiscal Issues

To develop a range of means by which the economic development of Nova Scotia and Atlantic Canada could be improved within the Canadian federation. Topics to be considered should include methods of stimulating economic development and the present system of fiscal arrangements.

11. Constitutional Process

To develop realistic options for improving upon the current procedures, conventions and formulas for amending the Canadian Constitution, taking into account the general desire for greater public confidence in the process and the need to reconcile current views in certain Provinces with respect to the veto power and equality of Provinces.

12. Comparative Federalism

To survey the institutions of federalism and the division of powers in other federal states and, on this basis, identify elements which could be applied to Canadian Constitutional reform.

Membership

13. The Advisory Committees shall be composed of resource persons of recognized expertise in their areas.
14. In the case of the Advisory Committee on Aboriginal Issues, the Confederacy of Mainland Micmacs, the Native Council of Nova Scotia, the Native Women's Association of Nova Scotia and the Union of Nova Scotia Indians will each be requested to nominate a member of the Committee. Other persons of recognized expertise in this area may also be appointed to this committee.
15. The composition of these committees shall be discussed with Constitutional affairs staff from the opposition parties.
16. Committee members will be asked to serve for expenses only, without honoraria or per diems, except where this may cause financial hardship.

Deadlines

17. Deadline for the Advisory Committees' reports shall be the beginning of September, at which time they shall be made available to the Working Committee and to Intergovernmental Affairs.
18. Deadline for the Working Committee's report shall be the beginning of November. Advisory Committee reports shall be made public at the same time as the Working Committee report or shortly thereafter.

APPENDIX II

BIOGRAPHIES OF MEMBERS OF THE ADVISORY COMMITTEES

ADVISORY COMMITTEE ON ABORIGINAL ISSUES

Dan Christmas (Bruce Wildsmith)	Union of Nova Scotia Indians
Joan Marshall	Nova Scotia Native Women's Association
Darliea Slauenwhite (Dwight Dorey)	Native Council of Nova Scotia
Mary Ellen Turpel	Co-Chair. Dalhousie University
Fred Wien	Co-Chair. Dalhousie University

ADVISORY COMMITTEE ON THE CHARTER OF RIGHTS, WOMEN'S, BILINGUAL AND MULTICULTURAL ISSUES

Margaret Conrad	Professor of History, Acadia University
Harley d'Entremont	President, Université Sainte-Anne
A. James Fanning	Department of the Attorney General
A. Wayne MacKay	Co-chair. Professor of Law, Dalhousie University
Leon E. Trakman	Co-chair. Professor of Law, Dalhousie University

ADVISORY COMMITTEE ON THE DIVISION OF POWERS AND GOVERNMENT INSTITUTIONS

Jennifer I. Smith	Chair. Associate Professor of Political Science, Dalhousie University, author of numerous articles on Canadian federalism and judicial review
Joel Fichaud	Partner, Patterson Kitz, experience in Constitutional law
Paul A. R. Hobson	Associate Professor of Economics, Acadia University, specialization in Federal-Provincial relations and local government finance

Peter B. Waite

Professor Emeritus of History, Dalhousie University, author of numerous articles and books, including The Life and Times of Confederation, 1864 - 1867, Macdonald: His Life and World, Years of Struggle, 1867 - 1896 and The Man from Halifax: Sir John Thompson, Prime Minister

J. Murray Beck

Professor Emeritus of Political Science, Dalhousie University, author of eight books and several articles on Nova Scotian and Canadian politics and government

ADVISORY COMMITTEE ON ECONOMIC ISSUES

Gary Grant

Professor of Economics, Nova Scotia Agricultural College. Interests in natural resource issues

Paul Hobson

Professor of Economics, Acadia University. Interest in the Canadian Federal-Provincial fiscal system

Jim McNiven

Dean, Faculty of Management, Dalhousie University; political scientist; Member of Royal Commission on Transportation; former Deputy Minister of Development, Nova Scotia.

Les O'Brien

Professor of Law, Dalhousie University; interests in financial regulation, Vice Chair of N.S. Securities Commission

Tim O'Neill

President, Atlantic Provinces Economic Council; economist: interests in regional development, formerly at St. Mary's University

Lars Osberg

Professor of Economics, Dalhousie University; interests in labour markets in Canada and in the Atlantic Provinces

Alasdair Sinclair

Chair. Professor of Economics, Dalhousie University; interests in trade and development

Denis Stairs

Vice President, Academic and Research, Dalhousie University; political scientist; interests in foreign policy and in Canadian Constitution

Gil Winham

Professor of Political Science, Dalhousie University; interests in trade negotiations and trade law

Ralph Winter

Professor of Economics, Acadia University; interests in regional development and in natural resources

ADVISORY COMMITTEE ON CONSTITUTIONAL PROCESS

- Andy Anstett
Town Manager in Liverpool, Nova Scotia. He did undergraduate and post-graduate studies in Canadian government and politics at the University of Waterloo. In Manitoba, he served variously as a Legislative Table Officer, Deputy Chief Electoral Officer, MLA, Government House Leader, Minister responsible for Constitutional Amendment, Minister of Municipal Affairs, Municipal Board Chair and Councillor with the Canada West Foundation.
- T. A. Cromwell
LL.B., B.C.L. (Oxon); member of bars of Ontario and Nova Scotia; Professor of Law, Dalhousie Law School; Vice-Chair, Labour Relations Board (Nova Scotia); former President Canadian Association of Law Teachers.
- A. Wayne MacKay
Professor at Dalhousie Law School. He has published articles in human rights, constitutional law, education law and prisoners' rights. He was formerly a high school teacher and in 1978-79 was law clerk to Chief Justice Laskin. Author of Rights, Freedoms and the Education System in Canada, and Education Law in Canada.
- Dianne Pothier
Associate Professor at Dalhousie Law School, teaching in the areas of constitutional, labour and public law.
- A. Paul Pross
Chair. Professor in the School of Public Administration, Dalhousie University. He is a specialist in the study of public policy processes.
- Della M. M. Stanley
Ph.D. Assistant Professor and Co-ordinator of Canadian Studies, Mount Saint Vincent University. Author of Louis Robichaud: A Decade of Power and Pierre Landry: A Man for Two Peoples. Areas of research interest include the political, social and cultural history of post-Confederation Acadia and the Maritime Provinces.

ADVISORY COMMITTEE ON COMPARATIVE FEDERALISM

- Agar Adamson
Chair. Professor of Political Science at Acadia University, and the author of several papers and articles on federalism, politics in Atlantic Canada, and referenda in Canada.
- Thérèse Arseneau
Professor of Political Science at St. Mary's University. Previously, she taught at Canterbury University in New Zealand. Her current research includes comparative federalism and political parties.

David M. Cameron

Professor of Political Science at Dalhousie University, and the author of several books and articles on federalism, intergovernmental relations, and public policy in Canada.

Herman Bakvis

Professor of Political Science at Dalhousie University was also a member of the Committee but had to withdraw for personal reasons. The members of the Committee missed his wise council and knowledge of federalism.

APPENDIX III

DATES AND LOCATIONS OF MEETINGS OF THE ADVISORY COMMITTEE ON ABORIGINAL ISSUES

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|----|--------------------|---------|
| 1. | 20 August, 1991 | Halifax |
| 2. | 30 August, 1991 | Truro |
| 3. | 6 September, 1991 | Halifax |
| 4. | 23 September, 1991 | Halifax |
| 5. | 10 October, 1991 | Halifax |
| 6. | 5 November, 1991 | Halifax |
| 7. | 18 November, 1991 | Halifax |